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01-798

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

FREDERICK J. HEAD, WARDEN,

Petitioner,

v.

LARRY ROMINE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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FORMER CAPITAL CASE
QUESTION PRESENTED

Should this Court grant certiorari to resolve the conflict among the circuits on whether state courts' merits decisions that are "silent" on federal law are still entitled to deference under 28 U.S.C. § 2254(d)?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Warden Frederick J. Head, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 15, 2001, and the denial of the request for rehearing on August 16, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 253 F.3d 1349, and is reprinted in the Appendix hereto, App. 1, infra.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 15, 2001, and the request for rehearing denied on August 16, 2001.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

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(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254.

STATEMENT OF THE CASE

Respondent Larry Romine (hereinafter "Romine") was tried in 1982 and found guilty by a Pickens County, Georgia, jury of the malice murder and armed robbery of his mother, Avilee Romine, and the malice murder of his father, Roy Lee Romine. The jury sentenced him to death for the two murders, and the trial court imposed a consecutive life sentence for armed robbery, but the Georgia Supreme Court reversed those death sentences, finding Romine had been impermissibly restricted in presenting mitigating evidence. *Romine v. State*, 251 Ga. 208, 305 S.E.2d 93 (1983).

At a resentencing trial in 1985, the jury again sentenced him to death, and those death sentences were affirmed on direct appeal. *Romine v. State*, 256 Ga. 521, 350 S.E.2d 466 (1986), *cert. denied*, 481 U.S. 1024 (1987), *reh'g denied*, 484 U.S. 1048 (1988). (App. 105). Among the issues raised on direct appeal was a claim that the prosecutor's closing argument referred to prejudicial factors, contained "misstatements" of law, violated state law and the Eighth and Fourteenth Amendments, denying him a fundamentally fair sentencing trial. (App. 135, 138-42). Citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985), Romine claimed, in part, the prosecutor tried "to dilute the jury's

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sense of responsibility" for sentencing by allegedly arguing it was "society's desire" and "God's will" that Romine should receive a death sentence. (App. 138-39). Noting portions of the argument were challenged for the first time on appeal, the state appellate court "examined the state's argument in its entirety" and found the prosecutor did not "seriously overstep his bounds." (App. 127).

Romine filed a state habeas corpus petition in January 1989 and challenged, in pertinent part, the prosecutor's closing argument at the resentencing trial, reasserting the claims from direct appeal and challenging additional portions of the argument. On March 1, 1993, the habeas corpus court denied relief in an unpublished order. On October 25, 1993, the Georgia Supreme Court denied Romine's application for a certificate of probable cause to appeal and denied rehearing on November 19, 1993. This Court denied certiorari. *Romine v. Zant*, 512 U.S. 1213 (1994).

Romine's federal habeas corpus petition was filed in the United States District Court, Northern District of Georgia in November 1996, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The district court denied relief on March 25, 1999. (App. 41). Noting that Petitioner Head (hereinafter "the Warden") had urged the district court to defer to the state habeas court's findings of procedural default as to those portions of the prosecutor's closing argument challenged for the first time in the state habeas petition, the district court found the Georgia Supreme Court had decided the issue on the merits on direct appeal so there was no procedural bar. (App. 93-94). The district court

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found that because the state appellate court "failed to address or apply the correct legal principles of federal law in its decision," the state court's decision was "contrary to clearly established federal law" so no deference was due the state court's decision under 28 U.S.C. § 2254(d)(1), and the district court reviewed the issue de novo (App. 96). The district court denied all relief. (App. 104).

Romine was granted a certificate of appealability on four issues, including the prosecutor's closing argument at the resentencing trial. The briefing schedule was stayed pending decision in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000).

In an opinion entered June 15, 2001, the circuit court decided only two issues and denied relief on a conflict of interest claim but granted relief on the prosecutor's closing argument claim and set aside the death sentences. (App. 1). The circuit court erroneously found the Warden had waived any procedural bar as to the prosecutor's argument, incorrectly noting the Warden had not argued to the district court that portions of the closing argument claim were defaulted and misreading the district court's opinion, as the latter court explicitly stated it was rejecting the Warden's argument to defer to the state habeas court's finding of default because the closing argument had been addressed on the merits on direct appeal. *Compare* App. 24-25 n. 14 and 93-94. The circuit court found the state appellate court's decision was "contrary to" federal law because only state law decisions were cited by the state appellate court in its decision; expressed "grave doubt" that the state court had applied the applicable federal law, much less "the governing law set down

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in Supreme Court decisions," although that law was never identified; conducted a de novo review and found the prosecutor's argument was constitutionally infirm under Eleventh Circuit precedent. (App. 27-39).

The Warden's petition for rehearing was denied on August 16, 2001. (App. 129). The Warden's motion to stay the mandate was granted on August 27, 2001.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON WHETHER A STATE COURT DECISION THAT IS SILENT AS TO FEDERAL LAW WARRANTS DEFERENCE UNDER § 2254'S STANDARD OF REVIEW.

The standard of review in 28 U.S.C. § 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams v. Taylor*, 529 U.S. at 412. Section 2254(d)(1) requires that federal courts defer to state courts' legal conclusions on constitutional questions decided on the merits unless the decision is "contrary to" or is an "unreasonable application of" "clearly established" Supreme Court precedent, with the source of that law being this Court's decisions. *Williams*, 529 U.S. at 412.

There is currently a conflict among the circuits on whether a state court's merits decision is owed any deference where the state court's opinion is "silent" as to the constitutional claim or does not discuss relevant federal

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law, or whether de novo review automatically ensues. Five circuits have held that a state court's adjudication of the merits still warrants deference as prescribed in § 2254(d)(1), even though the state court did not discuss federal law. *See, e.g., Sellan v. Kulhman*, 261 F.3d 303, 312 (2d Cir. 2001) ("in the absence of an explicit statement in the text that Congress intended the presence or absence of reasoning to determine which standard of deference to apply, we have no warrant to ignore a clear Congressional mandate"); *Bell v. Jarvis*, 236 F.3d 149, 160 (4th Cir. 2000) (en banc), *cert. denied*, No. 00-9290 (U.S. Oct. 1, 2001) (§ 2254(d) "does not require that a state court cite to federal law in order for a federal court to determine whether the state court decision" warrants deference); *Neal v. Puckett*, 239 F.3d 683, 686, 696 (5th Cir. 2001) ("it seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision' " and not the written opinion explaining that decision); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.), *cert. denied*, 522 U.S. 819 (1997); ("unreasonable application" prong's analysis does not place a federal court in a "tutelary relation to the state courts"); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999) ("adjudication on the merits" is a substantive, not procedural, resolution, and AEDPA deference is warranted even if state court does not expressly state its reasoning).

In contrast, two other circuits have ruled similarly to the panel in this case, that is, where the state court did not discuss the federal claim, no deference was warranted. *Hameen v. Delaware*, 212 F.3d 226, 247-28 (3d Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 1365 (2001)

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(where state court was given opportunity to apply controlling Supreme Court decisions but did not, no AEDPA deference was warranted); *Doan v. Brigano*, 237 F.3d 722, 730-31 (6th Cir. 2001) (where state court opinion was silent on federal question, no "unreasonable application" analysis was warranted, although the "contrary to" clause analysis was applicable).

A state court decision has thus far been described as being "contrary to" this Court's precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases," or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams*, 529 U.S. at 405-06. *See also Penry v. Johnson*, ___ U.S. ___, 121 S.Ct. 1910, 1918 (2001). The phrase "clearly established Federal law" refers to "holdings, as opposed to the dicta," of this Court's decisions. *Williams*, 529 U.S. at 412. *See also Tyler v. Cain*, 529 U.S. ___, 121 S.Ct. 2478, 2483 (2001).

Here, the prong applied by the circuit court was the "contrary to" prong, with the circuit court agreeing with the district court that the Georgia Supreme Court's decision on the propriety of the prosecutor's closing argument was not entitled to any deference since the state court did not cite or discuss "federal law." (App. 28; 96). Such a conclusion presupposes the existence of "clearly established" Supreme Court precedent which a state court has ignored and that the habeas petitioner had alerted the state court to any and all such decisions. The fallacy in the circuit court's analysis is demonstrated by the admission of each respective federal reviewing court

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in this case that there were no such Supreme Court decisions.

The circuit court acknowledged "there are no Supreme Court decisions involving a closing argument and surrounding facts that are materially identical to those in this case." (App. 26-27). The district court observed Romine "has not pointed to any Supreme Court cases nor has this court found any, which condemn this sort of argument as a violation of a defendant's due process rights." (App. 100).

Romine cited only *Caldwell v. Mississippi* on direct appeal in asserting the prosecutor's argument diminished the jury's sense of responsibility for sentence. (App. 138-39). Romine never even cited *Darden v. Wainwright*, 477 U.S. 168 (1986), or *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), on direct appeal. The district court found the prosecutor's remarks did not violate *Caldwell*. (App. 102). The circuit court never even applied *Caldwell* in its analysis This omission shows indirectly that the Georgia Supreme Court's failure to apply *Caldwell* to this argument was not unreasonable. However, the circuit court's reliance on the "contrary to" clause precluded any analysis of the state appellate court's decision under the "unreasonable application" prong and, more specifically, whether the Georgia Supreme Court unreasonably declined to extend *Caldwell* to the remarks at issue.

Instead, the circuit court reached the conclusion that the Georgia Supreme Court's decision was "contrary to" federal law because the state court cited no federal decisions, buttressed by the Warden's purported "concession" that the Georgia Supreme Court applied no federal cases.

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The Warden was simply stating the obvious: no decisions of this Court were cited by the Georgia Supreme Court. (App. 127). The state court's silence did not and does not answer the question of whether there were controlling decisions of this Court with which the state court's decision was "diametrically different" when it was announced. *Williams*, 529 U.S. at 405-406. The analysis used by the circuit court in this case stopped short of any such inquiry.

Williams further instructed federal courts that what qualifies as "an old rule" under *Teague v. Lane*, 489 U.S. 288 (1989), constitutes the "clearly established Federal law" to be applied by federal courts, with the source restricted to this Court's decisions. *Williams*, 529 U.S. at 412. As noted above, the circuit court found no decisions of this Court dealing with materially similar facts, and the district court found none as a matter of law.

After ridding itself of § 2254(d)(1)'s strictures by deeming the state court's silence as being "contrary to" unspecified decisions of this Court, the circuit court then embarked on a review of its own precedent which it concluded the state prosecutor violated. (App. 28-34). However, the state courts are bound under the Supremacy Clause by this Court's interpretation of the Constitution, not the federal circuit courts' interpretations even under pre-AEDPA law. *See, e.g., Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring). At no time did the circuit court find that "governing law set forth" in this Court's cases was violated. *Williams*, 529 U.S. at 405. The circuit court's only citation to this Court's

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authority came when it was deciding whether the arguments it deemed improper under its own circuit precedent violated due process under *Darden*. (App. 34). The circuit court concluded that any improper argument on mercy was not "cured" by the trial court's instructions, even though the Georgia Supreme Court had separately found the jury was properly instructed on mitigating circumstances, the option to "make a recommendation of mercy that is binding on the [trial] Court" even though the jury found no mitigating circumstances to exist, and the option to impose a life sentence for any reason or no reason. (App. 36-37; 121-22).

The circuit court not only considered evidence of record from the resentencing trial, the parties' arguments, and the jury's instructions, but, under the guise of examining the "totality of circumstances," considered factors that were both extraneous to that evidence and not part of the record on direct appeal at the time of the state appellate court's decision. These factors included procedurally defaulted claims, such as where jurors were housed during the trial or whether extraneous information was injected into jury deliberations, in contravention of *Teague v. Lane* and *Coleman v. Thompson*, 501 U.S. 722 (1991). The circuit court even found that the Warden had not argued that a juror's testimony should not be considered as a factor in analyzing the prosecutor's closing argument and used the juror's mental processes in finding the prosecutor's argument was improper. (App. 25 n.14). The reason the Warden did not advance such an argument is because Romine did not raise it in the federal

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petition as part of the attack on the prosecutor's argument. The juror testified at the state habeas corpus hearing on the issue of whether extraneous information had been injected into jury deliberations, a claim the state habeas court found was procedurally defaulted, a bar which the circuit court said it did not "dishonor." (App. 35 n.20).

The facts of this case are unique because of the role religion played in Romine's actions and motives in killing his parents. There was no genuine effort to apply the law that existed at the time of the Georgia Supreme Court's decision in 1986, finding no impropriety in the prosecutor's closing argument and affirming Romine's death sentences. Instead, the prosecutor's argument was viewed through the current "politically correct" lens of 2001 where the First Amendment now means "freedom from" rather than "freedom of" religion.

Just two years before Romine's resentencing trial, this Court reaffirmed, "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Barclay v. Florida*, 463 U.S. 939, 950 (1983). *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), had not been decided, in which the Court invalidated a jury instruction which included phrases "grave uncertainty" and "moral certainty" in defining reasonable doubt, although the Court retreated from that holding in *Victor v. Nebraska*, 511 U.S. 1 (1994). *Cage* itself is a new rule. *Tyler v. Cain*.

The overriding point is that governing decisions of this Court in effect at the time of Romine's retrial did not exorcise concepts of morality. *Teague v. Lane* is still viable,

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despite the AEDPA's amendments, and did not cut federal courts loose from their moorings to fashion new rules or distort existing rules in order to grant relief. The flawed analysis used by the circuit court in this case, however, removed any such constraint and led to an antithetical result.

Williams is only a starting point for applying the standard of review. No one has discussed the interplay between the standard of review and the state law doctrine, under which state courts have no obligation to raise and decide federal constitutional questions but could readily resolve issues on state law grounds. Pre-AEDPA cases cautioned that federal habeas corpus courts were to be careful about "imposing on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim." *Coleman v. Thompson*, 501 U.S. at 739.

The decision in this case is not limited to capital cases but would also apply in non-capital federal habeas corpus cases filed by state prisoners under 28 U.S.C. § 2254. Simply because no Supreme Court case may have been cited by the state court does not mean that the state court applied a contradictory ruling, as this Court's rule of law may have become so incorporated into state law that an express citation of it may seem superfluous. Examples include the factors examined to determine the reliability of a pretrial identification from *Neil v. Biggers*, 409 U.S. 188 (1972), or a decision applying the attorney error/actual prejudice test from *Strickland v. Washington*, 466 U.S. 668 (1984), to a "run of the mill" ineffective assistance of counsel claim. Merely because *Strickland* or *Neil* itself was not cited does not mean that the state court

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applied a rule that contradicted those cases. However, the decision in this case allows federal habeas corpus courts to ignore state courts' decision that are demonstrably in accord with this Court's cases merely because the state court opinion does not cite them. This would not seem to be what Congress had in mind in creating the standard of review.

In conclusion, this Court should grant review to resolve the conflict among the circuits on whether a state court's merits decision that does not discuss federal law still warrants deference. The need for an answer is exemplified by the decision in this case: the circuit court's analysis abruptly ended when the state court's decision cited no "federal law," and the circuit court assumed the existence of precedent to which the state decision was "contrary" even though no such precedent has been shown to exist. Had the circuit court conducted a more thorough analysis, the circuit court may have reached a different result and concluded the prosecutor's argument did not warrant reversal of Romine's death sentences.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Petitioner Head prays that this Court grant a writ of certiorari to review the decision of the Eleventh

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Circuit as the decision presents a question of paramount importance not previously decided by this Court.

Respectfully submitted,

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App. 1

No. 99-12449.

United States Court of Appeals,
Eleventh Circuit.

Larry ROMINE, Petitioner-Appellant,

v.

Frederick J. HEAD, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

June 15, 2001.

Thomas Jake Waldrop and Brian Mendelsohn, Federal Public Defenders, Federal Defender Program, Inc., Atlanta, GA, for Petitioner-Appellant.

Paula Khristian Smith, Georgia Dept. of Law, Atlanta, GA, for Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before CARNES, BARKETT and MARCUS, Circuit Judges.

CARNES, Circuit Judge:

This is a death penalty case. The Georgia Supreme Court succinctly summarized the key facts concerning the crime as follows: "Larry Romine, a former gospel singer and occasional preacher whose descent into a life of drugs and adultery met with severe parental disapproval and opposition, entered his parents' home one day while they were at work, waited for their return, and then killed them both with a .16 gauge shotgun." *Romine v. State*, 256 Ga. 521, 350 S.E.2d 446, 448 (1986), *cert. denied*, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 517 (1987). The

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murder occurred twenty years ago and since then, to put it in colloquial terms, the case has been tied up in the courts. For reasons we will explain, more court proceedings are to come.

For what he did to his parents, Romine was convicted by a jury of two counts of murder and one count of armed robbery. He was sentenced to death on the two murder counts and to life imprisonment on the armed robbery count. In the initial appeal, the Georgia Supreme Court affirmed all of the convictions and the life sentence on the armed robbery count, but it reversed the death sentences on the murder count because Romine had been denied a continuance he needed to present a mitigating circumstance witness. *See Romine v. State*, 251 Ga. 208, 305 S.E.2d 93 (1983).

At the resentencing trial in 1985 the jury in deciding upon a death sentence found the existence of one statutory aggravating circumstance as to each murder. The aggravating circumstance as to the murder of Romine's mother was that he committed it while robbing her (of her purse and a paycheck), and the aggravating circumstance as to the murder of Romine's father was that he committed it while he was also engaged in committing the murder of his mother. *See Romine*, 350 S.E.2d at 456-57. The Georgia Supreme Court affirmed the two death sentences on direct appeal. *Id.* at 457.

After losing on direct appeal, Romine pursued state collateral relief. In 1989 he filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, which was finally denied in an unpublished order in

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1993. The Georgia Supreme Court denied Romine's application for a certificate of probable cause to appeal the trial court's denial of collateral relief, and the United States Supreme Court denied certiorari in that proceeding in 1994. *See Romine v. Zant*, 512 U.S. 1213, 114 S.Ct. 2694, 129 L.Ed.2d 824 (1994).

In 1996, Romine filed a federal habeas corpus petition in the Untied [sic] States District Court for the Northern District of Georgia, which the court denied in 1999. This is the appeal from that denial.

DISCUSSION

Romine raises two issues that merit discussion, one relating to an arguable conflict of interest by trial counsel and the other involving the prosecutor's reliance upon Biblical authority during closing argument.[1]

A. THE CONCURRENT REPRESENTATION ISSUE

Romine was married to Diane Romine when the events relevant to this appeal occurred. On February 15, 1982, she appeared *pro se* before Pickens County Superior Court Judge Frank Mills, III, and pleaded guilty to charges of forgery and theft by taking. The forgery charges stemmed from her involvement in a scheme to

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[1] In addition to the two issues we discuss, Romine also contends that his counsel at the resentencing trial rendered ineffective assistance and that his constitutional rights were violated when a juror consulted the Bible during deliberations. In view of our disposition of the issue involving the prosecutor's closing argument, those other two issues are moot.

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obtain prescription drugs by presenting forged prescriptions to pharmacies, and the theft by taking charge stemmed from her having stolen some prescription pads from a doctor's office.[2] During the plea colloquy, Mrs. Romine confirmed to Assistant District Attorney George Weaver that no promises had been made to her and that she had not been offered lighter treatment for telling the truth. After Weaver presented testimony from three witnesses who described Mrs. Romine's role in the crimes, Judge Mills sentenced her to ten years, five to serve and five on probation.

George Thomas, along with his partner Mark Shriver, defended Romine at his original trial. In his investigation of Romine's case, Thomas was frustrated by the reluctance of many witnesses, including Diane Romine, to provide information about the facts surrounding the murders. Meanwhile, Thomas was himself jailed on charges of contempt in another case, and he ended up in a jail cell with Mrs. Romine and several other women. (Apparently, the jailer put Thomas in the women's cell as a joke.) During their quality time together, Mrs. Romine told Thomas why she was incarcerated and asked him to

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[2] Mrs. Romine was originally charged with forgery and burglary. She pleaded guilty to the forgery charges. However, at the plea colloquy she asked that the burglary charge be reduced to theft by taking, because she felt she had not committed a burglary. Assistant District Attorney George Weaver agreed to reduce the charge, because, according to Weaver, "[t]here is some question as to [whether Mrs. Romine had] authority [to enter the doctor's office]," and because there were "so many other felonies [i.e., forgeries]" charged in the case. Mrs. Romine then pleaded guilty to the reduced charge of theft by taking.

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intervene on her behalf "to see that she got the sentence she was promised and not the sentence that she got." Thomas agreed to represent Mrs. Romine in that regard. He did so in order to elicit information about Romine's case from the formerly uncooperative Mrs. Romine and to enlist her help in his defense of Romine.

On March 12, 1982, seventeen days before Romine's first trial began, Diane Romine came back before Judge Mills for a reduction of sentence. Although she was represented in that matter by George Thomas, the impetus for the reduction of sentence came from Judge Mills. He set the matter in motion, and ultimately reduced the sentence so that instead of serving five years in jail followed by five years of probation, Mrs. Romine would only serve one year in jail to be followed by nine years of probation. Judge Mills acted on his own, in part because of some information that had come to his attention. The DA's office took no position on whether Mrs. Romine's sentence should be reduced.

Thomas did not represent Mrs. Romine in any matter after her March 12, 1982 sentence reduction proceeding.[3]

Thomas had heard rumors while investigating Romine's case that Mrs. Romine had made a deal with the

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[3] There is no evidence that Thomas represented Mrs. Romine at any time during Romine's first trial. There is evidence, however, of his representation of Mrs. Romine at her sentence reduction proceeding on March 12, 1982, more than two weeks before Romine's trial. Thomas' name appears on the amended sentence order, and the district court found as a fact that Thomas did represent Mrs. Romine at that proceeding.

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state to receive a lenient sentence in her forgery case.[4] However, he was unable to substantiate any of those rumors.[5] On July 21, 1981, before Romine's first trial

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[4] The precise nature of the rumored deal is unclear. Diane Romine had previously worked in the Sheriff's Office, and Thomas testified at the state habeas proceeding that he had heard that the Sheriff wanted to prevent Mrs. Romine from revealing some information that could damage the Sheriff's Office or the Sheriff himself.

Thomas also testified that Mrs. Romine may have had a deal with the Georgia Bureau of Investigation ("GBI"), but GBI agents and Mrs. Romine denied that. Mrs. Romine testified in Romine's first trial that she visited him in jail shortly after his arrest and, pursuant to instructions Romine gave her during that visit, removed certain documents from his car. Later, at the state habeas hearing, GBI Agent Fran Wiley testified that Mrs. Romine had told the GBI what she had talked about with Romine during the jailhouse visit. Agent Wiley also testified that after Mrs. Romine removed the documents from Romine's car, she turned them over to the GBI. Though Agent Wiley admitted that Mrs. Romine cooperated with the GBI to some extent, the GBI agents and Mrs. Romine denied that any deal existed between them.

[5] At the state habeas hearing Mark Shriver, the attorney who assisted Thomas in representing Romine, testified that the District Attorney eventually "admitted that there was a deal" that Mrs. Romine would have her sentence in the forgery case reduced in return for her cooperation in Romine's first trial. Shriver clarified that "[i]t wasn't a great deal that all the charges were going to be dropped or dismissed or anything like that, but there was some tradeoff made." Shriver's testimony was based on his recollection of conversations and events that took place around the time of the first trial, approximately ten years earlier. Thomas, and not Shriver, was the one who primarily dealt with Ms. Romine during that time. Because all of the other evidence and testimony presented on this issue, including that of Mrs Romine, the GBI agents, and the District Attorney was

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began, Thomas filed a motion to require the state to reveal any deals between the State and Mrs. Romine. At the August 5, 1981 hearing on that motion, District Attorney Rafe Banks, the lead prosecutor at Romine's first trial, stated that he did not know of any deals between the District Attorney or the Georgia Bureau of Investigation ("GBI") and Mrs. Romine. Mrs. Romine herself testified that there was no deal between her and the state regarding Romine's case. In other words, Thomas' motion to have any deals revealed was granted, but the response was that no deal existed.

The first trial began on March 29, 1982 and included a familiar cast of characters: Diane Romine appeared as a witness for the State; Judge Frank Mills, III, who issued both the original and the amended sentences in Mrs. Romine's case, presided over the trial; George Thomas, who represented Mrs. Romine at her sentence reduction proceeding, was one of two attorneys for the defense; and George Weaver, the prosecutor in Mrs. Romine's case and at her sentence reduction proceeding, helped prosecute the case against Romine.

That same day, and soon after the trial began, Thomas filed a renewed motion to require the State to reveal any deals with Mrs. Romine. He did so because Mrs. Romine's sentence had been reduced just seventeen days earlier. At the hearing on that motion, Judge Mills stated into the record that he had reduced Mrs. Romine's sentence independently from the district attorney's office.

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consistent that no deal existed, the state habeas court found as a fact there was no deal with Mrs. Romine.

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The judge explained that he had acted on his own to reduce Mrs. Romine's sentence for several reasons. One was that a co-defendant, Ginger McIntyre, had testified that Mrs. Romine was not as culpable in committing the forgeries as Ms. McIntyre had depicted her to be during other testimony. The judge was also moved to be more lenient towards Mrs. Romine by correspondence he had received pertaining to her, including a letter from her parents, and because her co-defendants had received relatively light sentences. To the judge's knowledge, and he is the one who reduced her sentence, there was no deal between the State and Mrs. Romine.[6]

When Mrs. Romine appeared as a witness for the State at the first trial, she testified about Romine's drug use, his adultery, and about certain events that occurred after his parents were killed. Thomas cross-examined Mrs. Romine, but did not attempt to impeach her with her prior convictions, her sentence reduction in the forgery case, or her possible deals with the State. At the conclusion of that cross-examination, Judge Mills called Thomas to the bench and asked him about his failure to use Mrs. Romine's prior convictions to impeach her. Thomas told the judge that he was aware he could impeach Mrs. Romine with her prior convictions and that he had obtained certified copies of those convictions for

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[6] Later, in testimony at the state habeas hearing, Assistant District Attorney Weaver denied that the State had made any deals with Mrs. Romine, and GBI Special Agent Stanley Thompson and Assistant Special Agent Fran Wiley denied the existence of any deals between the GBI and Mrs. Romine.

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that purpose, but said that he had not decided whether to make use of them. Thomas then reserved the right to recall Mrs. Romine for cross-examination. He never did so. When Thomas was questioned approximately ten years later at the state habeas hearing about his failure to impeach Mrs. Romine at Romine's original trial, he could not remember why he did not bring up her previous convictions.

The state habeas court rejected Romine's claim that attorney Thomas labored under a conflict of interest because of his representation of Mrs. Romine in connection with her resentencing. The judge reasoned that because Thomas was not representing Mrs. Romine at the time of the trial there was no evidence of any actual conflict of interest, and "Mr. Thomas' actions vis-a-vis Diane Romine did not result in any adverse impact on petitioner because Mr. Thomas was acting in an effort to help petitioner."

Romine raised his conflict of interest claim in his federal habeas corpus petition, too, and the district court rejected it. Applying 28 U.S.C. § 2254(e)(1), the court accepted the state court's factfindings that Thomas no longer represented Mrs. Romine at the time of the first trial, that trial having begun more than two weeks after the conclusion of her sentence reduction hearing. The district court also agreed with the state habeas finding that "without question Diane Romine had no deal with the State." Finally, the court searched the record and found no evidence that Thomas had learned any confidential information during his brief representation of Mrs. Romine. As a result of those key factfindings, the district court treated the case as one involving successive

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representation instead of simultaneous representation, and held that there was neither an active representation of conflicting interests or an actual conflict of interest that adversely affected the lawyer's performance. Accordingly, it concluded that Romine had failed to establish, as required by § 2254(d)(1), that the state habeas court's decision, which applied the test set out in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law set out in Supreme Court decisions. We agree.

Cuyler and *Burger* were cases involving simultaneous representation, and the state court's decision in this successive representation case is not contrary to anything in either of those decisions. Nor is the state court decision on this issue an unreasonable application of either *Cuyler* or *Burger*. Whatever might be the result if Thomas had been representing Mrs. Romine at the time of the trial, he was not. Whatever might be the result if Thomas had learned confidential information during his representation of her, he did not. The same is true of any deal between Mrs. Romine and the State relating to the charges against her or the sentence she received. Whatever might be the result if there was such a deal, no deal existed.

And whatever might be the result if the reason that Thomas failed to impeach Mrs. Romine with her prior convictions was his previous representation of her, that was not his reason. Or at least, Romine, who had the burden on it, failed to establish that was his reason. As

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the district court explained, after Mrs. Romine gave testimony harmful to the defense during direct, Thomas used cross-examination to elicit testimony from her that was favorable to Romine. That testimony, which his wife was in a good position to provide, concerned Romine's past and his relationship with his children, his parents (the victims), with others, and his drug use. Thomas came to the trial prepared to impeach Mrs. Romine, having brought with him certified copies of her prior convictions, but at the conclusion of her testimony he had not decided whether to use them. He postponed a decision by reserving the right to call Mrs. Romine back to the stand for that purpose, but ultimately decided not to do so.

The problem is that by the time Thomas was asked about the matter at the state habeas hearing, a decade had passed and he could no longer remember his reasoning about not using Mrs. Romine's prior convictions to impeach her. But the placement of burdens in a federal habeas proceeding means that the effect of that problem falls on Romine. A petitioner has the burden of establishing his right to federal habeas relief and of proving all facts necessary to show a constitutional violation. *See, e.g., Delap v. Dugger*, 890 F.2d 285, 311 (11th Cir.1989). Where, as here, the evidence does not clearly explain what happened, or more accurately why something failed to happen, the party with the burden loses. *Cf. Williams v. Head*, 185 F.3d 1223, 1227-28 (11th Cir.1999) (where due to the passage of time trial counsel who is charged with rendering ineffective assistance does not recall all that he did or many of his thought processes relating to the trial, we will presume that counsel did what he should have

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done and that he exercised reasonable professional judgment). Or at least it is not unreasonable – which is the standard we are applying – for the state court to conclude that the burden-bearing party loses.

The state habeas court reasoned that "[i]n light of the record in this case it is just as reasonable to assume that ten years ago Mr. Thomas had a reason for acting as he did as it is to assume that in the absence of any explanation that the failure to impeach a certain witness was error. Petitioner has the burden of proof and has failed to carry it. . . ." Whether we view that as a factfinding or a conclusion of law or a little of both, it is reasonable. As the district court explained, "this court considers it unlikely Mr. Thomas' minimal prior representation of Ms. Romine infected his strategy on cross examination when Mr. Thomas was prepared to impeach her with certified copies of her convictions and retained the option of recalling Ms. Romine to impeach her but ultimately decided not to do so."

The state habeas court's decision that Thomas' prior representation of Mrs. Romine was not an actual conflict of interest that adversely affected his representation of Romine is not contrary to, and does not involve an unreasonable application of, *Cuyler* or *Burger* or any other Supreme Court decision.

B. THE STATE'S EXTENSIVE RELIANCE UPON BIBLICAL AUTHORITY IN ITS CLOSING ARGUMENT AT THE RESENTENCING TRIAL

Religion permeated virtually every aspect of the resentencing trial. There was extensive evidence about

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religion and its connection to the case that was properly admitted because it related to the crime and to Romine's character and behavior, and was therefore relevant to the issues before the jury. For example, there was testimony about Romine's religious upbringing and his subsequent rejection of Christian values. The jury learned how Romine's parents were deeply religious people who had raised him in strict accordance with the tenets of their Christian faith. Testimony described how he and Diane Romine had been very active in local church activities at the beginning of their marriage, how they performed in a gospel singing group, and about Romine having preached at several churches in the area. Evidence linked Romine's rejection of Christian values to his descent into adultery, drug use, and murder. Indeed, Romine himself testified that his misbehavior was attributable to the "devil's doings."

The problem is not the testimony about religion as it related to how Romine came to be in the dock at the resentencing trial. The problem is the prosecutor argued Biblical law to the jury as a basis for urging it to eschew any consideration of mercy and sentence Romine to death, and that argument came against a background of circumstances that aggravated the error. During the presentation of evidence, Romine's grandfather (the father of one victim and father-in-law of the other) appeared as a witness on behalf of Romine. The prosecutor cross-examined him about scripture, asking him whether he believed in the New Testament verse that commended "honor

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your mother and father or be put to death."[7] That alone would not have been constitutionally problematic, but there was more.

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[7] That part of the cross-examination went as follows:

Q And as far as being against the death penalty, you wouldn't want anybody to be electrocuted?

A No sir.

Q Not even somebody that commits the worst and most horrible murder you can possibly imagine?

A No siree.

Q You'd automatically vote against the death penalty?

A Ever since I've been saved, which is forty some odd years ago.

Q What about before you were saved, would you have . . .

A Well, really I was just a lost man and I didn't really think about it or didn't care just to tell you the truth about it. But after I got saved and began to follow the words of the Bible and so on and so forth. . .

Q Do you feel there's no Biblical basis for the death penalty?

A Well, I couldn't say. I don't have no education on that as far as reading the Bible and if I can't get it read to me why I ain't gonna say nothing.

Q Do you believe in the fifth commandment about honoring your mother and father?

A I don't believe I heard you.

Q Uh, you know the fifth commandment that says honor your mother and your father?

A Oh yes sir. I remember that one.

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After a lengthy voir dire session, the presentation of evidence took a week, and during that time the jury was sequestered. The jurors were not sequestered and lodged in a hotel or motel, but in the Baptist Assembly in Burnt Mountain, Georgia.[8] When the time came to recess the trial on Saturday night, the judge explained to the jurors that he and the attorneys were tired, and that he was not going to hold court on Sunday. He apologized for the imposition, since the jurors were sequestered. The judge explained that it would not be a good idea for the jurors to go out to church because people might want to come up and talk with them. He then told the jurors:

> Uh, let me ask this, will it be a problem for you all if you do not go tomorrow, or maybe get Brother Caylor out there, if he hasn't got something lined up, he might put you in a room and give you a good sermon, as long as he don't get on matters, uh, concerning this.
>
> But, uh, we can make sure you've got your Bibles and maybe some, maybe some television,

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Q Do you know in Matthew, the New Testament, it says honor your mother or father or be put to death? Are you familiar with that?

A Uh-huh.

Q No further questions.

The prosecutor did not cite the chapter and verse then, but he was obviously referring to *Matthew* 15:4: "For God said, 'Honor your father and mother,' and 'Anyone who curses his father or mother must be put to death.'" (New International Version).

The prosecutor would come back to that verse during closing argument

[8] Apparently, those were the best accommodations available in the area.

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uh, some of them I think have asked for television. I told them it would be alright to have your television out there for some of you. And it might be it could be put up in a room where more than, you know, several of you could get there. And, uh, you might even be able to pick up that Falcon game tonight at 7:30, gentlemen, and you ladies that like football.

But, nevertheless, if you can, see if you can attend church in the sense that you either read your own Bible or either watch it on television tomorrow morning. I realize that's probably not in keeping with some of your practices. But, uh, we do have - these men have been working hard to get the case ready, both sides. It's a difficult type case to get ready and they do need to do more work from the standpoint of helping get charges ready to go over, what they need to do in their closing arguments and things of that nature and they need some time. It's very difficult for them to be on trial all day long, then go home at night and try to get something else prepared. It is for me too.

After admonishing the jurors not to discuss the case, the court sent them to their Baptist Assembly quarters until 9:00 a.m. Monday morning. The record does not reveal whether Brother Taylor put the jurors in a room and gave them "a good sermon" as the judge had suggested.

Two days after the jury returned to court, the case was ready for closing argument. The prosecution opened the arguments, to be followed by the defense. There was to be no rebuttal argument. *See* O.C.G.A. § 17-10-2; *Beck v State*, 254 Ga. 51, 326 S.E.2d 465, 469 (1985). Towards the

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end of his argument the prosecutor held up crime scene photographs of the interior of the house in which Romine murdered his parents and told the jury:

> I apologize for showing those pictures again, but you need to see that and realize what's there. This is the debris we're talking about. [Romine] spattered his mother's living tissue, her heart still throbbing, pumping, . . . [and] sprays it all over that picture of the Last Supper of Christ sitting with the disciples. You know, this home, this home that he'd grown up in where Christian values were preached and taught and that's the only - that's the reason he shot them, one of the reasons, that they were too strict. . . .

That argument although graphic, was related to exhibits in evidence.

What came a page later was not. That is where the prosecutor wrapped up his argument with a rousing call for the jury to sentence Romine to death, after prayer if need be, because the Bible required that result:

> I ask you, ladies and gentlemen, to go out there and render a verdict that speaks the truth, and that is one that complies not only with the law of man, the law of God and when the counsel asks you . . . whether there is a Biblical basis for the death penalty and about turning the other cheek, uh, I want to submit to you Matthew 15 verse 4. And this, you know, this is New Testament stuff. That's where it says turn the other cheek too. "For God said, respect your father and your mother. And whoever curses his father or his mother is to be put to death." Now, curses, it's a - interpret the Greek word for

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curses, in the amplified version it goes beyond curses and it says abuses or treats improperly. And, uh, in Exodus 21:15, anyone who hits his mother or father should be put to death. So all of those things, hit, harm, abuses, mistreats, shall be put to death.

And, uh, there is nowhere in the New Testament where it eradicates the law. The Lord came to fulfill the law, not to change it or abolish it.

If you go all the way back, if you go all the way back to . . . [the] Fifth Commandment, it's the first commandment that has a promise to it. And that is that you honor your mother and father. You respect them, in order that your days may be long upon this earth. And if you violate that, you subject yourself to the possibility of not living as long as you might have lived. And I submit to you that the penalty should fit the crime. According to whether you curse your father, hit your father, abuse your mother, mistreat her, or shoot her in the chest from four feet away.

Leviticus 20 verse 9, the Lord gave the following regulation: "Anyone who curses his father or his mother shall be put to death." He is responsible for his own death.

So when counsel gets up here and tells you that you are pulling the switch in a case that if you wait five or ten years, there might be new evidence, uh, he's responsible for his own death. He killed his parents, I submit to you. You're not pulling the switch. You're just carrying out your duty. You took an oath to abide by that duty. Life for life, bone for bone, eye for eye.

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> And, uh, we just submit to you folks that there is a Biblical basis for all our laws. It's there. You can trace it back. For those of you, no matter how you've answered the question on voir dire, don't worry about it because if you want to – by the way I point out that I may have been out of the courtroom at the time, but I don't know that we opened, uh, court with prayer and pledge of allegiance but I submit to you, suggest to you, that perhaps that would be a – I don't know that that's appropriate, but the suggestion is there. You may want to pray about that and be sure you're doing the right thing and ask for some guidance
>
> Because you don't ignore totally what's in this book just because we're asking you to be the judge of the law and the facts because you take that common sense with you back there. And the judge will tell you, you know, what is a reasonable doubt. And he will explain to you it's an honest, fair-minded juror honestly seeking the truth.
>
> You know, and in about the next sentence it uses the word common sense and that's what we want you to use is your common sense.
>
> And the State is asking for a verdict that speaks the truth in this case and that's the death penalty.

With that, the prosecutor sat down. Defense counsel followed with a closing argument that quoted no scripture and did not argue religion at all.[9] During its instructions, the court told the jury that "whatever penalty is to

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[9] The closest defense counsel came to discussing religion was the last three sentences of his lengthy argument. There, after

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be imposed, within the limitations of the law as I have instructed you, is a matter solely for you members of the jury to determine," and that "you are the judges of both the law and facts in this case."[10] Both the prosecutor and

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referring to the possibility of the jurors listening to the news someday and hearing about Romine's electrocution, he said:

> I want you to be able to listen to that and as the smoke from that body rises up to an almighty God, say "I knew to an absolute moral certainty that Ginger didn't lie, that Larry had to die."
>
> If you can't do that, give him a life sentence and let him serve his God as best he can. I pray you'll understand.

[10] The court did tell the jurors not to consider the closing arguments as evidence. Immediately before the state prosecutor gave his closing argument, the court told the jurors:

> I caution you again that closing arguments as well as opening arguments are not evidence in this case. . . . You can accept in whole or in part the arguments of either of the attorneys or you can reject it entirely. Again, they're not evidence, but they are merely telling you what they think the evidence is and what inferences may be drawn from it. If that conforms to what you found the evidence to be in your inferences then that's fine. If it doesn't, then you may reject it.

The state prosecutor repeated this caution at the beginning of his closing argument:

> Ladies and gentlemen of the jury, as the court has instructed you anything I may say in these closing remarks is not evidence and anything that [the defense counsel] may say is not evidence. . . .

In addition, the court also instructed the jury at the beginning of the resentencing trial and after closing arguments to "only consider the evidence which has been introduced during this trial," and that evidence "does not include the indictment or the opening statements or closing arguments by the attorneys."

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defense counsel during their closing arguments had told the jury that same thing; the jurors were the judges of both law and fact.

The prosecutor's admonition to the jurors to base their decision on whether Romine should live or die on Biblical law struck home with at least some of the jurors. Linda Judkins, one of the jurors, testified at the state habeas proceeding that, immediately after the jury began its deliberations, she and another juror discussed one of the Biblical passages that the prosecutor had urged them to consider.[11] Although Ms. Judkins could not recall all of the details of that conversation, she did remember it concerned the interpretation of a Biblical passage about the proper punishment for patricide, and that during the discussion the other juror had asked her "how I could not see that this was what the Bible says you do with people who kill their parents." She also remembered that the discussion was prompted by the prosecutor's reference to the Biblical passage in his closing argument.[12]

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[11] Ms. Judkins never specified which juror she had this discussion with, but in another part of her testimony she revealed that she had discussed a Biblical passage with the juror she roomed with during the sequestration. Whether that discussion was the same one that occurred at the beginning of deliberations or was another one is unclear.

[12] The State has not argued to us that any of Ms. Judkins' testimony should not be considered because of Federal Rule of Evidence 606(b) or any related doctrine, and we imply no view on that issue. In the absence of any such argument by the State, we do consider Ms. Judkin's testimony about her discussion with the other juror or jurors, as well as her testimony about consulting the Bible during deliberations. *See also* n. 20, *infra*.

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The jury deliberated in the courtroom, because the jury room was too cramped to hold comfortably all the evidence and jurors. Ms. Judkins testified that, during the morning of the second day of deliberations, she noticed in the courtroom a Bible that had been used to swear in witnesses. She got the Bible and looked up a passage. The reason she did that, as she later explained, was:

> [T]he closing statement of one of the attorneys . . . quoted a passage of scripture and it just didn't sound right to me. It sounded like it had been quoted out of context or something was wrong with it and I just was curious about what it was that was bothering me about it. And I had written down little pieces of the scripture that was quoted thinking that after the case was over I would go home and look it up and figure out what it was that disturbed me about it.

(As we have previously explained, the prosecutor was the only one who quoted the Bible during closing argument.) When she testified about it, Ms. Judkins could not recall which passage she had looked up during deliberations, or whether she had discussed that passage with any other jurors. She testified:

> I really don't think I even said anything to anybody about it. Later on, I may have mentioned to the juror that I . . . roomed with, because I know she was interested in Biblical passages and we had talked about [the] Bible verse that the lawyer used. I don't recall that I really said anything about it in the courtroom, but I may be wrong, I may have. That was a long time ago.

On the first day the jury got the case, after about three-and-a-half hours of deliberations, the foreman

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reported to the court that "[w]e have a pretty wide division on it right now and the consensus of most everybody here is . . . that they don't believe they can make a decision on it, about it." The judge sent the jury to supper, and after it returned there were less than two hours more deliberation before the evening recess. Within an hour after beginning deliberations again on the second day, the jury sent the judge a note stating: "We are unable to reach a unanimous decision and are certain we will not ever be able to reach one." The foreman reported that the division was eleven to one, although he did not say which way. Those events prompted a defense motion for a mistrial, which under Georgia law would have meant a life sentence, *Hill v. State*, 250 Ga. 821, 301 S.E.2d 269, 270 (1983), the court denied the motion. Within an hour of resuming deliberations, the jury was back with a question about mitigating circumstances; the court recharged it on the subject. After the jury deliberated three or four more hours, the court called the jury back and gave it an *Allen* charge, and denied another defense motion for a mistrial. Following a couple more hours of deliberations, the jury returned with its unanimous verdict sentencing Romine to death. The court imposed that sentence as its judgment.

In his direct appeal from the resentencing judgment, Romine contended that the prosecutor's closing argument violated the Due Process Clause, a contention that focused on, among other things, the prosecutor's use of Biblical authority and his urging that a death sentence was necessary to comply with the law of God. The Georgia Supreme Court's disposition of that issue, in its entirety, was as follows:

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> On appeal, Romine for the first time complains of additional portions of the prosecutor's closing argument. Having examined the state's argument in its entirety, we conclude that nowhere did the prosecutor seriously overstep his bounds. We find no reversible error. *See Davis v. State*, 255 Ga. 598(16), 340 S.E.2d 869; *Cook v. State*, 255 Ga. 565(12C), 340 S.E.2d 843 (1986); *Ford v. State*, 255 Ga. 81(8i), 335 S.E.2d 567 (1985); *Walker v. State*, 254 Ga. 149(14), 327 S.E.2d 475 (1985); *Spivey v. State*, *supra*, 253 Ga. 187(4), 319 S.E.2d 420.

Romine v. State, 256 Ga. 521, 350 S.E.2d 446, 456 (1986).[13] The state habeas court declined to rule on the issue because the Georgia Supreme Court already had rejected it. *See Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644, 645 (1986) (issue raised and decided on direct appeal may not be re-litigated in state habeas proceeding).

The federal district court noted that Romine had failed to preserve the closing argument issue at trial, but held that there was no procedural bar because the Georgia Supreme Court had decided it on the merits. The district court also held that independent *de novo* review was required because the Georgia Supreme Court had

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[13] The Georgia Supreme Court's language about "additional portions of the prosecutor's closing argument" was a reference to contentions discussed in an earlier part of its opinion that elsewhere in his closing argument the prosecutor had violated Georgia law by referring to the possibility that if Romine were sentenced to life he might be released some day. *Romine*, 350 S.E.2d at 456. About that issue, the Court said that it "views the prosecutor's argument with disfavor, but we hold that it does not sink to the level of reversible error." *Id.*

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"failed to address or apply the correct legal principles of federal law in its decision." But then the district court seemed to be referencing § 2254(d), by commenting that under AEDPA "this court can only grant relief if the state court decision contravenes clearly established federal law as set forth by the Supreme Court. 28 U.S.C. § 2254(d)(1)." Whatever the effect of that comment, the district court did finally perform *de novo* review, concluding: "Regarding the prosecutor's exhortation from the Bible, however, the court finds those comments clearly improper but [they] do not rise to the level of a due process violation."

We begin our analysis of this issue by noting that if there were any procedural bar as to the Biblical reliance closing argument claim, the State has waived it. The State did not assert a procedural bar to this specific claim in the district court and has not argued one as to it in this Court.[14] *See Gray v. Netherland*, 518 U.S. 152, 166, 116 S.Ct.

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[14] The State did not argue to the district court, and has not argued to us, that the closing argument claim as it relates to use of Biblical authority (paragraph 216 of the amended petition) is procedurally barred. The State's brief to us does point out that the separate claim relating to the prosecutor beginning his closing argument by asking if court had been opened with prayer (paragraph 215 of the amended petition) is one the district court found was procedurally defaulted. State's Brief at 41. That matter is not without confusion, however, because while the amended petition and the answer to it, as well as the district court's order, all refer to the prosecutor beginning his argument by asking or wondering out loud if the court had opened with prayer, that statement actually did not occur at the beginning of the prosecutor's argument. It happened on the next to last page of his fifty-three page closing argument. In any event, even putting the separate claim about the prosecutor

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2074, 2082, 135 L.Ed.2d 457 (1996) ("If the misrepresentation claim was addressed at some stage of federal proceedings, the Commonwealth would have been obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter.").

We turn now to the merits where our task involves determining whether the Georgia Supreme Court's rejection of this claim was a decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In applying the "contrary to" prong of the § 2254(d)(1) test, we look to see whether the Georgia Supreme Court "applie[d] a rule that contradicts the governing law" set down in United States Supreme Court decisions, or arrived at a different result involving materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 1519-20, 146 L.Ed.2d 389 (2000). If so, we are "unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's 'contrary to' clause." *Id.* at 406, 120 S.Ct. at 1520.

The Georgia Supreme Court's rejection of the Biblical law closing argument claim was not an instance of a state court arriving at a result different from that in a Supreme Court decision involving materially identical facts, because there are no Supreme Court decisions involving a

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asking about prayer aside, as we will in order to avoid getting bogged down in the procedural bar issues relating to it, the prosecutor's extensive reliance upon Biblical authority comprises a claim that the State does not argue is procedurally barred from our consideration.

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closing argument and surrounding facts that are materially identical to those in this case.

There are, however, problems for the judgment on the second prong of the "contrary to" test, which requires that we determine whether the Georgia Supreme Court applied a rule that contradicts the governing law set down in United States Supreme Court decisions. *Id.* To begin with, it is far from clear what, if any, rule of federal law the Georgia Supreme Court applied. Its entire three-sentence discussion of the issue simply finds "no reversible error" based upon the bare conclusion that "nowhere did the prosecutor seriously overstep his bounds." *Romine*, 350 S.E.2d at 496. A string cite to five state court decisions are all the authority that is given. *Id.* To top things off, the State's brief tells us that "it is difficult to fault the state appellate court for not applying federal law in its decision," which clearly seems to concede that the Georgia Supreme Court did not apply federal law.[15]

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[15] The entire statement as it appears in the State's brief is as follows: "With all due respect, it is difficult to fault the state appellate court for not applying federal law in its decision when Petitioner cited none for the second challenged portion of argument and cited only *Caldwell [v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985)] for the first challenged portion and whether it was applicable authority was not clear at that juncture." State's Brief at 44. The "first challenged portion" of the argument, it is clear from the context, is the part in which the prosecutor argued that the jury should impose the death penalty because it comported with the will of God as set out in the Bible. *See* State's Brief at 42-43. (The "second challenged portion" was the prosecutor's argument about the blood and tissue of Romine's mother being splattered on the painting of the Last Supper.)

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Given all these factors, especially the State's concession, we have *grave* doubt that the Georgia Supreme Court applied federal law at all, let alone the governing law set down in Supreme Court decisions. Failure to apply that governing law (or the same rule in state law) is tantamount to applying a rule that contradicts governing law, for these purposes. And under *Williams* that means the federal habeas court "will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's 'contrary to' clause." 529 U.S. at 405-06, 120 S.Ct. at 1519-20. In other words, when there is grave doubt about whether the state court applied the correct rule of governing federal law, § 2254(d)(1) does not apply. That is what we have here, so we proceed to decide the issue *de novo*, as the district court did.

The law relating to prosecutorial argument at the sentencing stage of a capital case has been settled in this circuit since four en banc decisions on the subject were released in Georgia cases 16 years ago. *See Brooks v. Kemp*, 762 F.2d 1383 (11th Cir.1985) (en banc), *vacated on other grounds*, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *reinstated*, 809 F.2d 700 (1987) (en banc); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir.1985) (en banc); *Tucker (Willian[illegible]) v. Kemp*, 762 F.2d 1480 (11th Cir.1985) (en banc).

We realize, of course, that the State's apparent concession that the Georgia Supreme Court did not apply federal law in deciding this claim is inconsistent with its failure to challenge the district court's holding that there is no procedural bar as to the claim because the state supreme court decided it on the merits. But nothing prevents the State from waiving any procedural bar defense it has, *see Netherland*, 518 U.S. at 166, 116 S.Ct. at 2082, or making any concessions it feels appropriate.

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vacated on other grounds, 474 U.S. 1001, 106 S.Ct. 517, 88 L.Ed.2d 452 (1985), *extended and reinstated*, 802 F.2d 1293 (11th Cir.1986) (en banc); *Tucker (Richard) v. Kemp*, 762 F.2d 1496 (11th Cir.1985) (en banc). Under that well-settled law habeas relief is due to be granted for improper prosecutorial argument at sentencing only where there has been a violation of due process, and that occurs if, but only if, the improper argument rendered the sentencing stage trial fundamentally unfair. *See Brooks*, 762 F.2d at 1400; *Drake*, 762 F.2d at 1458; *see also Spivey v. Head*, 207 F.3d 1263, 1275 (11th Cir.2000). An improper prosecutorial argument has rendered a capital sentencing proceeding fundamentally unfair if there is a reasonable probability that the argument changed the outcome, *Brooks*, 762 F.2d at 1401, which is to say that absent the argument the defendant would not have received a death sentence. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* (citation omitted); *Drake*, 762 F.2d at 1458; *Spivey*, 207 F.3d at 1275-76.

The first step in analyzing any sentence stage prosecutorial argument is to determine if it is improper, because no matter how outcome-determinative it is a proper argument cannot render the proceedings fundamentally unfair and therefore cannot be the basis for a constitutional violation. *Brooks*, 762 F.2d at 1403 ("A permissible argument, no matter how 'prejudicial' or 'persuasive,' can never be unconstitutional."), *Spivey*, 207 F.3d at 1276 ("Proper arguments, regardless of their impact on the outcome of the case, do not render a trial unfair.").

We have had only a few decisions involving prosecutorial sentence-stage argument employing Biblical

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authority. In *Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir.1991), we recounted a number of closing remark improprieties the prosecutor had made, and included in that list his "numerous appeals to religious symbols and beliefs, at one point even drawing an analogy to Judas Iscariot." (footnote omitted). A closer fit to the present case is our observation in *Cobb v. Wainwright*, 609 F.2d 754, 755 n. 2 (5th Cir.1980), that: "In his zeal to obtain a death sentence the prosecutor made several clearly objectionable, and objected to, remarks. For example, at one point in his argument, the prosecutor resorted to the Bible. He told the jury that under its teachings there was no reason to show the defendants mercy." That is exactly what the prosecutor used scripture to persuade the jury in this case: that mercy was out of the question for anyone who murdered his parents; that under the law of God death is the mandatory penalty for patricide. It was as though the prosecutor sought to overrule, as far as this jury was concerned, *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977) (holding mandatory death penalty statute unconstitutional), *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (same), and *Roberts (Stanislaus) v. Louisana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (same).

The prosecutor's misuse of scripture in this case is improper for the same reason it is improper for prosecutors to use the now-infamous *Eberhart* quotation, which we have condemned on at least seven occasions. *See Nelson v. Nagle*, 995 F.2d 1549, 1555-58 (11th Cir.1993) (holding the use of the *Eberhart* quotation in sentence-stage closing argument improper and citing six other decisions reaching the same conclusion). *Eberhart v. State*

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47 Ga. 598 (1873), is a Reconstruction-era Georgia Supreme Court opinion in a capital murder case which contains a tirade against mercy.[16] The opinion rails against "that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime," complains that "[w]e have had too much of this mercy," which "is not true mercy," because "[i]t only looks to the criminal" and so forth.[17] The *Eberhart* opinion was discovered by Georgia prosecutors in the post-*Furman* capital punishment era, and some of them delighted in quoting from it to juries during closing argument at the sentence stage of capital cases. *See Potts v. Zant*, 734 F.2d 526, 535 (11th Cir.1984) ("The *Eberhart* court's florid denunciation of 'that sickly sentimentality' that prompts some citizens to oppose the death penalty appears to have made it a particular favorite of some Georgia prosecutors . . . "), *vacated on other grounds sub nom., Potts v. Kemp*, 478 U.S. 1017, 106 S.Ct. 3328, 92 L.Ed.2d 734 (1986), *reinstated*, 864 F.2d 1512 (1988).[18]

Sometimes the prosecutors attributed the *Eberhart* quotation to "the Justice of the Supreme Court of Georgia," *Drake*, 762 F.2d at 1458, sometimes to "one of our

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[16] The interesting historical context in which the *Eberhart* opinion was issued is discussed in *Drake v. Kemp*, 762 F.2d 1449, 1467-69 (11th Cir.1985) (en banc) (Hill, J., concurring).

[17] The longer quotations from *Eberhart* that prosecutors used can be found in *Nelson*, 995 F.2d at 1556, and the other of our *Eberhart* issue decisions cited therein.

[18] Six of the seven *Eberhart* quotation cases that made it to our court were from Georgia, while the seventh, *Nelson*, was from Alabama. We can only infer that the technique spread west.

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noted justices," *Bowen v. Kemp*, 769 F.2d 672, 681 (11th Cir.1985); sometimes to "a judge," *Nelson*, 995 F.2d at 1556; and sometimes to "a noted legal scholar from the 1800's," *Wilson v. Kemp*, 777 F.2d 621, 623 (11th Cir.1985).

Regardless of the source to which the prosecutors attributed it, however, we have always condemned use of the *Eberhart* quotation at the sentence stage of a capital case, describing it variously as "improper," *Bowen*, 769 F.2d at 681; "clearly improper," *Potts*, 734 F.2d at 536; "highly improper" *Presnell v. Zant*, 959 F.2d 1524, 1529 (11th Cir.1992); and "undeniably wrong," *Drake*, 762 F.2d at 1459. The reason its use is improper, as we have explained, is that invoking the authority of a court, judge, or legal scholar to persuade the jury that mercy can have no place in a capital sentencing proceeding is undeniably wrong. *Drake*, 762 F.2d at 1459; *Wilson*, 777 F.2d at 626 ("[W]hen the prosecutor argues that it is mercy itself that is inappropriate, the jury is told that the concept of mercy – the most significant factor which might point toward a choice of life imprisonment – is illegitimate."); *cf. Brooks*, 762 F.2d at 1417 ("Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required.").

The *Eberhart* argument is wrong on the law, because mercy is acceptable in post-*Furman* capital sentencing regimes, and if anything, is particularly favored under Georgia's statute, which permits the jury in its unbridled discretion to impose a life sentence regardless of the number or strength of aggravating circumstances. *See Drake*, 762 F.2d at 1459 ("In the current Georgia capital

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punishment regime, the sentencing jury has complete discretion to choose between life imprisonment or death after the finding of one statutory aggravating circumstance."); *Tucker*, 762 F.2d at 1504 n. 10 ("Once such a circumstance has been found, the jury has complete discretion to impose death or life imprisonment as a punishment."). Telling a Georgia capital sentencing jury that the state supreme court, or a justice of it, or some judge or legal scholar has decided that they should not even consider mercy misleads the jury about one of its central tasks, which is to decide whether the individual, convicted murderer standing before it should receive mercy.

Likewise, a prosecutor misleads a capital sentencing jury when he quotes scripture as higher authority for the proposition that death should be mandatory for anyone who murders his parents. And that is what this prosecutor argued to the jury: in the Bible God said that anyone who kills his parents should be put to death, no "if's," "and's," or "but's" about it. That may or may not be Biblical law, but it is not post-*Furman* capital punishment law.

If, instead of quoting scripture, the prosecutor in this case had attributed the same pronouncements found in the scriptures he quoted to the Georgia Supreme Court or a justice or other noted legal authority, we know from our decisions dealing with the *Eberhart* quotation, that the argument would have been improper. It is no less improper to attribute the same abjuration of mercy to the

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higher authority of the Bible.[19] The possibility always exists that some jurors will be at least as impressed by Biblical authority as by the authority of a court or a legal scholar. Recall that two of the jurors who decided Romine's fate actually discussed the meaning and effect of one of the scriptures the prosecutor urged on them, and one juror consulted a Bible to make sure that the prosecutor had one of the Bible verses right. It mattered to her.

Because the prosecutor's extensive reliance upon anti-mercy scripture was improper in this case, we turn now to the second step of the legal analysis, which is to determine if the improper argument warrants habeas relief. Not all improper prosecutorial arguments require relief, because not all of them render the proceeding unfair, which is the measure of a due process violation. *See Darden v. Wainwright*, 477 U.S. 168, 179-81, 106 S.Ct. 2464, 2470-71, 91 L.Ed.2d 144 (1986) (relief not required merely because the argument "deserves the condemnation it has received from every court to review it"). A sentence proceeding is rendered unfair by an improper argument if, absent the argument, there is a reasonable probability that the result would not have been a death sentence, a reasonable probability being one which undermines our confidence in the outcome. *See Spivey*.

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[19] We have previously acknowledged in a capital case that "translating facts into a penalty is an ethical operation," *see Brooks*, 762 F.2d at 1407. In this case, we have no occasion to decide, and imply no view about, whether quoting scripture in closing argument in a capital sentence proceeding will always be improper. We decide only that the particular use to which scripture was put in this case is improper.

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207 F.3d at 1275-76, *Williams v. Kemp*, 846 F.2d 1276, 1283 (11th Cir.1988) ("[A]lthough we wholeheartedly condemn the prosecutor's remarks, we do not believe that these comments rendered Williams' sentencing proceeding fundamentally unfair."); *Brooks*, 762 F.2d at 1401; *Tucker*, 762 F.2d at 1504-05; *Drake*, 762 F.2d at 1458. In making this prejudice determination, "[o]f primary importance is the need to examine the entire context of the judicial proceeding." *Brooks*, 762 F.2d at 1400; *accord*, *Cargill v. Turpin*, 120 F.3d 1366, 1382 (11th Cir.1997) ("after a thorough review of the full context of the sentence proceeding . . . "); *Gates v. Zant*, 863 F.2d 1492, 1503 (11th Cir.1989) ("Considering the totality of the circumstances. . . . ").

The circumstances here include a sentence stage trial saturated with evidence relating to religion, in which the jurors are sequestered at a Baptist assembly, where the judge suggested having "Brother Caylor out there" put the jurors in a room and "give you a good sermon."[20]

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[20] Romine presented as a separate claim for relief the juror consulting a Bible during deliberations, and may have presented as a separate claim the lodging of the jurors at the Baptist Assembly. The district court found those claims were procedurally barred from consideration, the State has argued that bar to us, and we do not dishonor it. Our decision that relief should be granted is not based on either of those claims. We do, however, consider the facts underlying them as part of the totality of the circumstances that we must consider now that we have reached the prejudice prong of the prosecutorial argument claim. There is no requirement that a defendant object to every circumstance relevant to the determination of whether there was prejudice from an error contained in a claim for which there was no procedural default (or, as with this closing argument claim in the present case, a claim for which any procedural default has been waived)

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Then the prosecutor in his closing argument gave the jurors a hell fire and brimstone mini-sermon the effect of which was to tell them that regardless of the law of Georgia, they ought to follow the law of God, as the prosecutor interpreted it to rule out any consideration of mercy.

"[I]solated, or ambiguous or unintentional remarks must be viewed with lenity," *Brooks*, 762 F.2d at 1400, and a brief remark is less likely to cause prejudice. *Id.* at 1415. However, there was nothing ambiguous or unintentional about the prosecutor's improper argument in this case, and it was more than a brief remark. Instead of being "fairly isolated within the body of the prosecutor's argument," *Bowen*, 769 F.2d at 681-82, these improper remarks were strategically placed at the end. It can make a difference if the improper argument was preceded by remarks of defense counsel which invited it, *see Darden*, 477 U.S. at 179, 106 S.Ct. at 2170, or if it was followed by defense argument which ameliorated the error, *see id.* at 182, 106 S.Ct. at 2472; *Cargill*, 120 F.3d at 1379; *Gates*, 863 F.2d at 1503; *Tucker (William)*, 762 F.2d at 1488. Here there was no invitation – defense counsel had not even argued at that time – nor was there any responsive argument that adequately ameliorated the effect of it.

An on-the-spot curative instruction from the court can make a difference, or failing that, improper argument can sometimes be remedied by the final instructions to the jury. *Cargill*, 120 F.3d at 1379; *Brooks*, 762 F.2d at 1400. There was no curative instruction from the court at the time of the argument, and the final instructions to the jury did not effectively cure the error, either. The court and both counsel did tell the jury that closing arguments

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were not evidence, but that did not help because the problem with this improper argument is not that it misstated the evidence, but that it misstated the law. The court's instructions to the jury, as well as both sides' arguments, stressed that the jurors were the judges of the law as well as the evidence. That did not help, either; instead, it may have hurt by leading some jurors to believe that they could substitute the Biblical law urged upon them by the prosecutor for the law of Georgia.

In most cases we are left to speculate about what effect, if any, closing argument may have had on the jury, but here we know that this improper argument led at least two members of the jury into a discussion about its content, a discussion in which one of them argued to the other the precise point of the improper argument. And we know that a juror cared enough about the argument to check one of the scriptures that the prosecutor had used in order to ensure that he had quoted it correctly.

Of course, the relative strength of the aggravating and mitigating circumstances is an important factor to be considered in deciding whether there is a reasonable probability that but for the improper argument the result might have been different. *See Cargill*, 120 F.3d at 1379; *Brooks*, 762 F.2d at 1415-16; *Tucker (Richard)* 762 F.2d at 1509. One ready measure of that in this case is the fact that the jury was initially deadlocked on whether the sentence should be life or death. The foreman initially told the judge that there was a wide division and the jurors did not believe they could reach a decision, which under Georgia law would have resulted in a life sentence. *See Hill v. State*, 250 Ga. 821, 301 S.E.2d 269, 270 (1983). After an overnight recess and further deliberations, the

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jury sent the court a note announcing with certainty that it would never be able to reach a unanimous decision. Only after the court gave the jurors an *Allen* charge did they finally reach a verdict. The difficulty the jury had in reaching a verdict, especially when coupled with the evidence that one or more jurors were affected by the improper argument, weighs in favor of concluding that there is a reasonable probability that argument may have affected the result.

The primary factor weighing against a finding that the improper argument rendered the sentencing proceeding unfair is the lack of any contemporaneous objection to it. *See Cargill*, 120 F.3d at 1379; *Williams*, 846 F.2d at 1283 ("[T]hat no objection was made during the prosecutor's closing argument further supports our belief that the statement was not severe enough to render the sentencing hearing fundamentally unfair."), *Brooks*, 762 F.2d at 1397 n. 19 (the absence of an objection "may demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging"). We have considered that, and given it weight, but the factors pointing in the other direction in this case outweigh the implications of counsel's failure to object. *See Drake*, 762 F.2d at 1460-61 & n. 16 (relief due because of improper *Eberhart* quotation argument notwithstanding the absence of any contemporaneous objection to it).

We have previously described why the improper argument here is closely analogous to the *Eberhart* quotation argument which we have found to be improper all seven times we have considered it. The scripture-quoting argument in this case, like the *Eberhart*-quoting argument,

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strikes at the heart of one of a Georgia jury's most important roles in a capital sentence proceeding, which is to make an individualized determination of whether mercy should be afforded in a specific case to a particular defendant. In six of the seven cases in which this Court has considered the *Eberhart* quotation argument, we have decided that its use rendered the sentence proceeding unfair, concluding that it undermined our confidence in the result to such an extent that habeas relief was required. *See Nelson*, 995 F.2d at 1557-58. We reach the same conclusion here. In view of all of the facts and circumstances, the prosecutor's improper argument in this case undermines our confidence in the sentencing result to such an extent that habeas relief is required as to the sentence.[21]

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[21] The circumstances of this case are unusual. We have no reason to decide, and do not mean to imply any view about, whether the same result would follow if the jurors had not been sequestered in a Baptist assembly and had not been told about getting a good sermon from Brother Caylor, or if the prosecutor's argument had come in reply to argument by the defense or had been responded to in kind by the defense, or if there had been a curative instruction, or if there had been no evidence that the argument had struck home with some jurors, or if the jury had not been initially deadlocked, or if the effect of a deadlock had been different under Georgia law, and so forth. We have decided this case, as we are required to do, based upon all of the specific facts and circumstances presented in it. *See Cargill*, 120 F.3d at 1382; *Gates*, 863 F.2d at 1503; *Brooks*, 762 F.2d at 1400.

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CONCLUSION

The district court's judgment is AFFIRMED to the extent that it denies habeas relief as to the conviction, but it is REVERSED to the extent that it denies habeas relief as to the sentence. The case is REMANDED to the district court for further proceedings consistent with this opinion.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

LARRY ROMINE,	:	
Petitioner,	:	
v.	:	CIVIL NO.
TONY TURPIN, Warden, Georgia Diagnostic and Classification Center	:	2:96-CV-102-WCO
Respondent	:	

ORDER

(Filed Mar. 25, 1999)

This case is before the court for consideration of petitioner Larry Romine's amended petition for writ of habeas corpus filed on November 20, 1996 [7-1]. Petitioner asserted twenty-two claims for habeas corpus relief under 28 U.S.C. § 2254. This court DENIES the petition for writ of habeas corpus for the reasons stated herein.

FACTUAL BACKGROUND

On March 19, 1991, petitioner's parents, Avilee and Roy Lee Romine were shot and killed in their home in Pickens County, Georgia. Petitioner Larry Romine was charged and convicted for the two murders as well as the armed robbery of Mrs. Romine. He was sentenced to death. On appeal, the Georgia Supreme Court affirmed the convictions while reversing the death sentences.

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Romine v. State, 251 Ga. 208 (1983). Following a resentencing trial in 1985 petitioner was again sentenced to death on both counts. His death sentences were affirmed on direct appeal by the Georgia Supreme Court. *Romine v. State*, 256 Ga. 521 (1986). The Supreme Court denied certiorari *Romine v. Georgia*, 481 U.S. 1024 (1987).

In January of 1989, petitioner filed a state habeas corpus petition in the Superior Court of Butts County. On March 1, 1993, the state habeas court denied relief. On October 25, 1993, the Georgia Supreme Court denied petitioner's certificate of probable cause to appeal. The United States Supreme Court denied certiorari. *Romine v. Zant*, 114 S. Ct. 2694 (1994). Petitioner filed the instant federal habeas corpus petition on November 1, 1996, asserting twenty-two claims for relief, which he subsequently amended

DISCUSSION

I Standard of Review

Section 2254(d) of Title 28, United States Code, requires:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) requested in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Asserting that the provisions of § 2254(d)(1) does not apply, petitioner requests that this court conduct a de novo review of his claims. Specifically, petitioner argues that the state habeas court did not make an adjudication on the merits because the state court adopted an order drafted by respondent's counsel. Section 2254(d) does not define the word "adjudication," but the common legal definition is "the giving or pronouncing a judgment or decree in a cause." Black's Law Dictionary 63 (4th ed. 1968). From this definition, it is clear that even when a court adopts a draft order as its own, it is giving a decree in the case.[1]

Moreover, although no cases have addressed the question of whether § 2254(d) applies when the state court adopts an order drafted by the prevailing party, the case law suggests that such action by the court does not necessitate a de novo review of the ruling. Indeed, such findings of the lower court are reversed only if they are clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985); *see Jefferson v. Zant*, 263 Ga. 316 (1993) (relying on *Anderson*). In *Anderson*, the Supreme Court criticized the district court for adopting a petitioner's findings but found no reason to subject the district court's adopted findings to a more stringent review. The district court had

[1] Petitioner argues, without citation, that an "adjudication is the process used by the court to arrive at the decision." The court declines to adopt this definition.

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set forth the essential findings in a preliminary memorandum and directed petitioner's counsel to submit more detailed findings consistent with them. *Id.* In addition, respondent was given the opportunity to respond at length to the proposed findings, which he did. *Id.*

The Eleventh Circuit has joined the Supreme Court in admonishing district courts for the verbatim adoption of proposed orders drafted by litigants. *In re Dixie Broadcasting, Inc.*, 871 F.2d 1023, 1029 (11th Cir. 1989); *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987). Even the ghostwriting of orders by one of the litigants with no notice to the other side does not vacate the order unless the party disputing the order shows that the process by which the judge arrived at the outcome was "fundamentally unfair." *Dixie Broadcasting*, 871 F.2d at 1030; *Colony Square*, 819 F.2d at 276.

In *Colony Square*, the court held that no fundamental unfairness existed when the judge had reached a firm decision before asking one party to draft the order and the party opposing the order had ample opportunity to present its arguments. Similarly, in *Dixie Broadcasting*, the court upheld an opinion written by one of the parties when the lower court judge had noted in open court and in the presence of all counsel that he had asked one party's counsel to draft the order and the other parties did not ask to review the draft or to have the opportunity to object to it.

The instant case presents even less support for submitting the order of the state court to a more stringent review. First, the state habeas court made a verbal ruling on the petition and then requested respondent's counsel

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to reduce the verbal ruling to a written order. Resp. Ex. 3, Butts County Record (hereinafter "Butts R.") p. 970, Order of State Habeas Court. Second, both petitioner and respondent engaged in a process of excepting to the proposed order before the court issued a final order. *Id.* Accordingly, although this court joins other courts in critiquing the adoption of orders written by litigants, this court finds that the state habeas court's procedure to reduced its verbal ruling to a written order was fundamentally fair and is considered an adjudication within the meaning of § 2254(d). Thus, the standard of review as outlined in § 2254(d) applies.

The Eleventh Circuit has recently adopted a three step process in evaluating habeas claims under § 2254(d)(1).[2] *Neelley v. Nagel*, 138 F.3d 917, 924 (11th Cir. 1998), *petition for cert. filed*, (U.S. August 17, 1998) (No. 98-6528). First, the court must determine what federal law applicable to the petitioner's claim is "clearly established" by the Supreme Court at the time of the state court's adjudication. *Id.* This determination is similar to that undertaken pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). Second, the court must evaluate whether the "state court adjudication was contrary to clearly established Supreme Court precedent, either because the state

[2] Petitioner argues that the Eleventh Circuit incorrectly interpreted § 2254(d) and urges the court to apply the First Circuit's standard of review as outlined in *O'Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998). To the extent that *O'Brien* is inconsistent with Eleventh Circuit precedent, this court declines to apply *O'Brien*.

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court failed to apply to the proper Supreme Court precedent, or because the state court reached a different conclusion on substantially similar facts." *Neelley*, 138 F.3d at 924. After determining that the state court adjudication was not contrary to clearly established law, the court considers whether the state court unreasonably applied the relevant Supreme Court authority. *Id.* "The state court decision must stand unless it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect." *Id.* at 924-25.

The parties disagree on whether under the new § 2254(d)(1) standard, Eleventh Circuit jurisprudence may be considered in determining the merits of the habeas claim. Relying on the plain language of § 2254(d)(1) the court finds that Congress' intent is clear – the court should focus on Supreme Court cases in determining whether a state court's decision was contrary to or an unreasonable application of clearly established federal law. *See Neelley v. Nagle*, 138 F.3d at 923; *Sweeney v. Parke*, 113 F.3d 716, 718 (7th Cir. 1997).

However, this language does not bar the court from considering lower federal court decisions. Instead, lower federal court decisions are not "entirely irrelevant," particularly in determining whether the state court's application of Supreme Court precedents was unreasonable.[3] *O'Brien v. Dubois*, 145 F.3d 16, 21 (1st Cir. 1998); *Green v. Wharton*, No. 4:96-CV-0112 HLM, 1997 W.L. 404278, at *5

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[3] The court reserves on ruling whether lower federal court decisions may be considered in determining whether the second prong of the *Neelley* test has been met, that is, whether a state court decision was "contrary to" clearly established federal law.

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(N.D. Ga. 1997); *but see Sweeney*, 113 F.3d at 718 (holding that lower federal court jurisprudence may no longer be considered); *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir. 1997) (same). In considering whether the state court decision is an unreasonable application of federal law, the court may not apply lower federal decisions merely because the court disagrees with the state court's outcome. *O'Brien*, 145 F.3d at 25. Rather, the court's role under § 2254(d) is to determine whether "the state court decision [is] so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *Id.*

II Procedurally Defaulted Claims

After careful consideration, the court finds the following claims to be procedurally barred under O.C.G.A. § 9-14-48(d) and thus procedurally defaulted:[4]

(1) Claim I with respect to the failure to provide funds for an adequate psychiatric examination at the resentencing trial;

(2) Claim V;

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[4] The court has previously found the following claims to be procedurally defaulted under O.C.G.A. § 9-14-51, Georgia's successive petition rule: (1) Claim III §§ 3, 4, and 5; (2) Claim VIII paragraph 215; (3) Claim X with respect to any claim under the Sixth Amendment; and (4) Claim XV with respect to the failure to give a charge regarding the unadjudicated crimes introduced by the state as non-statutory aggravating evidence. Order of May 29, 1997. In addition, the court has ruled that Claim XXII paragraphs 185-190 is procedurally defaulted. Order of March 23, 1998.

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(3) Claim VI with respect to counsel's failure to object to the introduction of petitioners confessions at the resentencing trial; and

(4) Claim IX.

A court should ordinarily consider the procedural default issue before reaching the merits of a claim. *See Lambrix v. Singletary*, 117 S. Ct. 1517, 1523 (1997). "A state prisoner seeking federal habeas corpus relief, who fails to raise his federal constitutional claims in state court, or who attempts to raise claims in a manner not permitted by state procedural rules is barred from pursuing the same claim in federal court absent a showing of cause for an actual prejudice from the default." *Marek v. Singletary*, 62 F.3d 1295, 1301 (11th Cir. 1995). To establish cause for the procedural default, the petitioner must show "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rules." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In addition, a showing of a possibility of prejudice is not sufficient. Rather, petitioner must show that the errors at his trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982).

However, "[a] federal court is not required to honor a state procedural ruling unless the ruling rests on an independent and adequate state ground." *Alderman v. Zant*, 22 F3d 1541. 1549 (11th Cir. 1994) (citing *Harris v. Reed*, 489 U.S. 255, 269 (1989)). "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in

the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 262.

In Georgia, the state habeas court must "consider whether the petitioner made a timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal." O.C.G.A § 9-14-48(d). Absent a showing of cause and prejudice, failure to comply with this rule is a ground for denying habeas corpus relief. *Id.*

Respondent asserts that § 9-14-48(d) may be applied only to petitioner's claims of error at his resentencing trial. In considering federal habeas petitions, courts cannot rely on a state procedural bar unless that rule was "firmly established and regularly followed" at the time to which it is to be applied. *Ford v. Georgia*, 498 U.S. 411, 424 (1990). Section 9-14-48(d) was signed by the governor of Georgia and became effective on April 13, 1982 but only applies to habeas corpus petitions filed after January 1, 1983. *Valenzuela v. Newsome*, 253 Ga. 793, 797 (1985) (Hill, J., concurring); Georgia Laws 1982, p. 786, § 5. A review of Georgia cases shows that Georgia courts have regularly followed § 9-14-48(d) for habeas petitions filed after January 1, 1983. *See Alderman v. Zant*, 22 F.3d 1541, 1551 (11th Cir. 1994) (affirming district court's order which in part held that Georgia courts regularly defaulted claims under § 9-14-48(d) when the petitioner did not pursue the claim on direct appeal). Petitioner's habeas corpus petition was filed after January 1, 1983. Accordingly, this court rules that § 9-14-48(d) can act to procedurally default claims relating to petitioner's original trial with

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respect to whether petitioner pursued those claims on direct appeal.[5]

Regarding Claim I, petitioner procedurally defaulted on his claim of lack of funding for a mental health expert during his resentencing trial. The state habeas court specifically found that petitioner's claim of inadequate funding for medical experts at the resentencing trial was procedurally defaulted under O.C.G.A. 9-14-48.[6] Butts R. at 934. In addition, a review of petitioner's brief in support of his direct appeal from his resentencing trial and his supplemental brief reveals that petitioner did not assert any error regarding the denial of more funds for a mental health examination. Resp. Ex. 2S, Brief of Appellant (delineating fourteen grounds for reversal); Resp. Ex. 2V, Supplemental Brief. Moreover, petitioner has failed to show cause and prejudice for his procedural default.[7]

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[5] The court recognizes that the contemporaneous objection portion of § 9-14-48(d) may not be used to bar petitioner's claims. Petitioner was convicted on April 3, 1982, ten days before § 9-14-48(d) became effective. Thus, § 9-14-48(d) cannot be considered to be firmly established at the time of petitioner's original trial in order to procedurally default claims based on petitioner's failure to object at trial.

[6] The state habeas court was the last state court rendering judgment in this case as petitioner's Certificate of Probable Cause to Appeal was denied by the Georgia Supreme Court without opinion on October 25, 1993.

[7] With respect to all claims that this court finds to be procedurally defaulted, petitioner has not specifically addressed cause for the default. However, the court observes that petitioner's statutory response is that his counsel's ineffective assistance constitutes cause for the default. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Smelcher v. Attorney General of Ala.*, 947 F.2d 1472, 1475 (11th Cir. 1991). As this court finds *infra*

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Accordingly, petitioner's claim is procedurally barred pursuant to O.C.G.A. § 9-14-48(d).

In Claim V, petitioner procedurally defaulted on his claim that incriminating statements and evidence were garnered from him through his then wife Dianne Romine as an agent of the Georgia Bureau of Investigation (GBI). The state habeas court specifically found that O.C.G.A. § 9-14-48(d) barred this claim. Butts R. at 937 (ruling that ground nineteen of petitioner's amended petition was procedurally defaulted). A review of the appeal from the original and resentencing trials shows that counsel failed to include this claim as one of the enumerations of error. Resp. Ex. 1Q, Brief from Original Trial (setting out nine enumerations of error), Resp. Ex. 2S, Brief from Resentencing Trial (delineating fourteen grounds for reversal); Resp. Ex. 2V, Supplemental Brief. Petitioner has not shown cause and prejudice for his counsel's failure to include this claim in the direct appeal of the original and resentencing trials. Thus, this court is barred from considering Claim V.

Regarding Claim VI, the court finds that petitioner has procedurally defaulted on his claim of failure to oppose the introduction of petitioner's confessions at the resentencing trial. The state habeas court specifically found that this claim was procedurally defaulted as to the resentencing trial. Butts R. at 935. A review of petitioner's brief on direct appeal from the resentencing trial shows

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that petitioner's counsel at his original and resentencing trials did not render ineffective assistance of counsel, any alleged ineffectiveness by counsel cannot serve as cause for procedural default on any of petitioner's claims.

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that petitioner did not make such a claim on appeal. Resp. Ex. 2S, Brief of Appellant; Resp. Ex. 2V, Supplemental Brief. Petitioner has failed to demonstrate cause or prejudice for his default. Accordingly, this court is procedurally barred from considering the portion of this claim relating to the resentencing trial.

In Claim IX, petitioner asserts that a juror's consultation of a Bible during deliberations at the resentencing trial violated his right to due process and his right under the Eighth Amendment to a sentencing process that was free from constitutionally impermissible factors. A review of the petitioner's brief on appeal shows that petitioner did not assert this claim on direct review. *See* Resp. Ex. 2S, Brief of Appellant; Resp. Ex. 2V, Supplemental Brief. The court finds that petitioner has procedurally defaulted on this claim. Petitioner's procedural default is excused if he can demonstrate cause and actual prejudice. *See Marek*, 62 F.3d at 1301.

Petitioner sets out three causes for procedural default and asserts that prejudice is demonstrated by the meritorious nature of the claim. The court finds that petitioner has not demonstrated the actual prejudice required to excuse a procedural default. The court has reviewed the testimony of juror Linda Judson at the state habeas hearing. Resp. Ex. 3F at 417. Ms. Judson testified that the judge allowed the jury at the resentencing trial to deliberate in the courtroom because the jury room was too small. *Id.* at 418. After the jury began deliberations, Ms. Judson discussed a biblical passage with one of the jurors, which would support the death penalty for killing one's parents. *Id.* at 425. On the next day during the course of the deliberations, Ms. Judson picked up the Bible used to

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swear witnesses and looked up a verse that she thought the prosecuting attorney had misstated. *Id.* at 419. Ms. Judson did not discuss what she found with the other jurors until after the verdict was rendered. *Id.* at 420, 422.

The court finds that petitioner has not demonstrated that Ms. Judson's consultation of the Bible actually and substantially disadvantaged him by infecting his entire trial with error of constitutional dimensions. Ms. Judson explained that she looked up the verse because she was puzzled by the prosecutor's paraphrase and not because she intended to use the verse in the course of the deliberations. Furthermore, Ms. Judson did not discuss her findings with another juror until after the verdict was rendered. Because of petitioner's failure to demonstrate actual prejudice from the default, petitioner's claim remains procedurally defaulted.

In addition, petitioner requests that this court consider Claim III § 3 on the merits. This court has already held that this ground is procedurally defaulted in its ruling on the motion to treat new claims as procedurally defaulted [14-1] and petitioner's motion for reconsideration [26-1]. *See* Order of May 29, 1997 at 2-5 (holding that Claim III § 3 is procedurally defaulted); Order of March 23, 1998 at 4 (denying motion for reconsideration). Petitioner now urges the court reconsider its decision once again. The court finds petitioner's request to be highly improper. *See* LR 7.2 NDGa ("Parties and attorneys for the parties shall not file motions to reconsider the court's denial of a prior motion for reconsideration.").

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III. Claim I: Failure to Provide Adequate Funds for an Appropriate Mental Health Examination

Petitioner claims that his due process rights were violated by the state court's failure to provide adequate funds for an appropriate mental health examination pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985). In addition, petitioner asserts that the prosecutor engaged in misconduct by encouraging the court to deny the funds although he knew that the amount was inadequate for a competent examination. The court will address each contention in turn.

A. Failure to provide adequate funds for a mental health examination

Respondent urges the court to deny petitioner's claim as to the original trial on mootness grounds and on the merits. Specifically, respondent asserts that petitioner's claim of lack of funds for mental health experts is mooted because the original sentencing trial was reversed in the original direct appeal. The state habeas court specifically found that petitioner's claim of lack of adequate funds during the original sentencing trial was mooted because it was later reversed. Butts R. at 938. After expressing reservations as to the applicability of *Ake v. Oklahoma*, 470 U.S. at 68, the state habeas court proceeded with its analysis under *Ake*. *Id.* The state habeas court found no basis for relief under *Ake*. This court rules that petitioner's claim regarding the guilt/innocence phase of his original trial is not mooted because the reversal of petitioner's original sentencing trial did not abrogate the petitioner's conviction, only his first death sentence.

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Thus, petitioner's claim of lack of adequate funds regarding his original trial will be considered on the merits.

The first issue to consider is whether *Ake v. Oklahoma* applies at all to petitioner's original trial. *Ake* was decided in 1985, well after petitioner's original trial and conviction in April 1982 but before the United States Supreme Court denied certiorari on April 20, 1987. In *Teague v. Lane*, 489 U.S. at 310, the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rule are announced." Because petitioner's conviction did not become final until the Supreme Court denied certiorari, *Ake* applies. *See Lambrix*, 117 S. Ct. at 1525 (conducting *Teague* analysis based on when petitioner's time for filing a petition for certiorari expired).

In *Ake*, the trial court denied funds for a psychiatric examination of an indigent defendant. The Supreme Court held that once a defendant makes a sufficient showing that his mental state at the time of the offense is at issue, the state must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. The Court explained that without the assistance of a psychiatrist on "whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses" the risk of an inaccurate resolution on the defendant's sanity is high. *Id.* at 82. However, providing access to a competent psychiatrist does not mean that "a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." *Id.* at 77.

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In moving to the second part of the tripartite analysis outlined in *Neelley v. Nagle*, the court finds that the state habeas court's determination that no *Ake* violation occurred was not contrary to clearly established federal law. The state habeas court applied the proper Supreme Court precedent and the factual differences between *Ake* and the case subjudice do not demand a similar conclusion. Thus, the state habeas court's result cannot be said to be "contrary" to *Ake*.

The remaining issue then is whether the state habeas court unreasonably applied *Ake*. Petitioner urges that the trial court improperly limited funds for a psychiatric examination to $500 when the defense presented evidence from three psychiatrists that an adequate examination would cost at least $1500. As a result, Dr. Cohen performed an evaluation which was allegedly below the standard of care within his profession and prejudiced petitioner's case.

The state habeas court held that "the trial court did not deny petitioner due process inasmuch as petitioner never complained of the competency of his expert, Dr. Cohen, nor otherwise indicated to the trial court that he wished an additional examination." Butts R. at 940. Because *Ake* specifically left the parameters of implementing the right to access to a psychiatrist in the hands of the states, *Ake*, 470 U.S. at 83, the court holds that it was not an unreasonable application of *Ake* for the state court to approve a process in which an indigent defendant receives limited funds for a mental consultation and retains the right to petition the court for additional funds as needed.

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The state habeas court found that the trial court granted petitioner's request for funds for the appointment of a private psychiatrist at a rate of $100 per hour, not to exceed five hours. Butts R. 940; Resp. Ex. 1 at 207, Order of September 11, 1981. The order specifically did not "preclude application for additional funds upon presentation of itemization of work done and sufficient evidence of necessity for further assistance." Resp. Ex. 1 at 207, Order of September 11, 1981. A month later, the trial court considered a motion for additional funds for psychiatric examination and ruled that petitioner used the $500 previously allocated to him to "begin the process of his examination." Resp. Ex. 1 at 266, Order of October 12, 1981. The court reiterated that "Upon said initial examination and the affidavit of the examining psychiatrist documenting the necessity for additional examination and assistance, Larry Romine may re-petition the Court for additional funds for those examination." *Id.* Petitioner hired Dr. Sheldon Cohen to conduct a psychiatric examination, and Dr. Cohen testified for petitioner at the original trial.[8]

Unlike the defendant in *Ake*, petitioner was provided state funds in order to be examined by an independent psychiatrist and the opportunity to petition the court for additional funds. Indeed, the *Ake* court distinguished cases in which neutral psychiatrists had examined the defendant at trial and the court found that no additional psychiatric assistance was necessary. *Ake*, 470 U.S. at 84-85 (distinguishing *United States ex rel. Smith v. Baldi*,

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[8] Dr. Cohen also testified for the state at the resentencing hearing.

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344 U.S. 561 (1953) and *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir. 1951)). Thus, it was not unreasonable for the trial court to approve an initial fee of $500 with repeated instructions for defense counsel to move for additional fees as necessary. Petitioner's trial counsel never did so.

In addition, this court rejects petitioner's argument that *Ake* requires the state to provide an indigent defendant with a psychiatrist who performs at a certain professional level. Several courts have held that *Ake* does not create a federally mandated standard of care for defense psychiatrists. To hold otherwise "would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate." *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.) (rejecting the proposition that a criminal defendant is entitled to the effective assistance of a psychiatrist), *cert denied*, *Wilson v. Taylor*, 119 S. Ct. 536 (1998); *see also Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990) (refusing to engage in the battle of psychiatric opinions); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990) (holding that *Ake* does not authorize federal courts to "engage in a form of 'psychiatric medical malpractice' review as part-and-parcel of its collateral review of state court judgments").

Because the state habeas court did not violate clearly established federal law in holding that petitioner was accorded all the process that he was due under *Ake*, petitioner's claim for relief on this claim is denied.

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B. Prosecutorial Misconduct

Petitioner asserts that the prosecutor withheld evidence that petitioner could not receive an adequate examination for the funds provided by the court in violation of *Brady v. Maryland*, 373 U.S. 83 (1967), *United States v. Agurs*, 427 U.S. 97 (1976) and *United States v. Bagley*, 105 S. Ct. 3375 (1985). Specifically, petitioner points to a letter from Martha Kuckleburg to district attorney Rafe Banks dated October 16, 1981, which opined that an adequate psychiatric examination would cost more than the $500 allotted by the trial court. The prosecution did not disclose the letter to the defense and continued to argue that the $500 was sufficient.

Respondent urges the court to find procedural default under Georgia's successive petition rule of O.C.G.A. § 9-15-51 because this claim was not raised in the Butts County petition. However, this court has found that the prosecutorial misconduct claim was raised in Claim VI, part A, on page 33 of the amended petition for writ of habeas corpus filed in the Superior Court of Butts county. Order of May 29, 1997 at 14. Thus, the claim is not procedurally defaulted. Because the state habeas court did not specifically address the issue, the court will consider it on the merits.

The court finds no *Brady* violation from the prosecution's nondisclosure of the Kuckleburg letter. In *Brady*, 373 U.S. at 87, the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment,

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irrespective of the good faith or bad faith of the prosecution." The Court subsequently made it clear that the defendant's failure to request the favorable evidence did not necessarily satisfy the prosecution's duty to disclose. *Agurs*, 427 U.S. at 97. Instead, "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines the confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678.

The nondisclosure of the Kuckleburg letter does not undermine the confidence in the outcome of the trial. In conjunction with its motion for additional funds for a psychiatric examination, the defense submitted one affidavit and two letters from psychiatrists stating that a psychiatric examination was not possible for $500. Resp. Ex. 1 at 239-46. Thus, because petitioner possessed evidence that a psychiatric examination would cost more than $500 and presented that evidence to the court, which the court considered, the nondisclosure of an additional letter stating the same opinion did not materially affect the outcome of the trial. Indeed, the trial court ruled that petitioner could apply for additional funds if he could prove what additional psychiatric assistance was needed after an initial consultation. Resp. Ex. 1 at 266, Order of October 12, 1981

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IV Ineffective Assistance of Counsel: Guilt/Innocence Phase of the Original Trial

A. Claim II § 1. Failure to Adequately Prepare and Present the Testimony of a Psychiatrist

Petitioner asserts that his original trial counsel, Mr. George Thomas, failed to adequately prepare and present the testimony of a psychiatrist at the guilt/innocence phase of petitioner's trial, resulting in the ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, petitioner claims that Mr. Thomas did not seek additional funds for further psychiatric evaluation, provide the necessary background information to Dr. Sheldon Cohen, petitioner's psychiatric expert witness, did not communicate with Dr. Cohen until shortly before the trial, did not prepare Dr. Cohen adequately for his testimony, and allowed Dr. Cohen to give testimony extremely detrimental to petitioner's case. In addition, petitioner claims that Dr. Cohen could have testified that petitioner was suffering from toxic psychosis at the time of the offense, which "substantially impaired him in his ability to distinguish between right and wrong, to understand and appreciate the nature and consequences of his acts, and to conform his conduct to the requirements of the law." Resp. Ex. 3G at 449, Aff. of Dr. Sheldon Cohen ¶ 4.

Under the familiar test of *Strickland*, to show ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must first show that the counsel's performance was deficient. *Strickland*, 466 U.S. at 687. Deficient performance is defined as representation that falls "below an objective standard of reasonableness." *Id.*

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at 688. However, the court does not scrutinize counsel's performance with an eagle eye, pinpointing every flaw in judgment. Instead in evaluating the conduct "from counsel's perspective at the time . . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action, 'might be considered sound trial strategy.' " *Id.* at 689. Second, defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In applying the second part of the *Neelley* test, the court finds that the state habeas court's denial of this claim was contrary to clearly established law. The state habeas court failed to apply *Strickland*'s two part analysis in determining whether the offering of Dr. Cohen as a witness was ineffective assistance of counsel.[9] When a state court "fails to apply the correct legal principles to decide a case," the reviewing court must independently consider the merits of the claim. *Neelley*, 138 F.3d at 923. 927.

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[9] The state habeas court summarily stated that petitioner's claim was "without merit" and observed that effective assistance of counsel claims are to be determined from the viewpoint of counsel at the time of the original trial. Butts R. at 966.

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With respect to the deficiency prong, the court finds that Mr. Thomas' representation did not fall below the standard of care in light of the presumption of adequate representation. First, the reason for Mr. Thomas' failure to request additional funds for psychiatric assistance was made clear at the state habeas corpus hearing. There, Mr. Thomas testified that Dr. Cohen had informed Mr. Thomas that he had "done an exhaustive examination and had done everything usual and necessary in the examination by a forensic psychiatrist in a criminal case." Resp. Ex. 3E at 215, Proceedings of January 21-22, 1992. Second, with respect to petitioner's other complaints, the court finds that Mr. Thomas' meeting with and preparation of Dr. Cohen was not constitutionally deficient. In the week before petitioner's original trial, Mr. Thomas and Dr. Cohen met for dinner. *Id.* at 219. At that time, they went over Dr. Cohen's testimony and Dr. Cohen assured Mr. Thomas that he would testify that "Larry Romine was not a person with a violent disposition and that his violent behavior toward his parents was peculiar to that domestic relationship because of the way they had raised him." *Id.* Dr. Cohen's testimony regarding petitioner's "murderous feelings" was a total surprise to Mr. Thomas. *Id.* In addition, as to petitioner's claim that Mr. Thomas did not adequately provide enough background information, Dr. Cohen had testified at the sentencing phase of the original trial that he examined petitioner on two separate occasions and that at those times, he was able to acquire petitioner's history. Resp. Ex. 1M at 2059, Proceedings of April 2, 1982.

The affidavits of Bobby Lee Cook and G. Terry Jackson opining that practitioners in the field would not have

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intentionally used Dr. Cohen's damaging testimony overlook the fact that Dr. Cohen's testimony was at odds with what he told Mr. Thomas his testimony was going to be. The Cook and Jackson affidavits offer no opinions on whether Mr. Thomas' preparation of Dr. Cohen for his testimony was inadequate.

Furthermore, even if petitioner's allegations regarding Mr. Thomas' failure to adequately prepare Dr. Cohen for his testimony and the elicitation of extremely damaging testimony fell below the objective standard of care, these actions would not be prejudicial. Dr. Cohen testified during the sentencing phase of petitioner's original trial after the jury had returned a verdict against petitioner. That sentencing phase was reversed by the Georgia Supreme Court. *Romine v. State*, 251 Ga. 208 (1983).

Petitioner argues that without Dr. Cohen's testimony, he would not have gotten the death penalty in the first place or, at least, the state would not have been made aware of Dr. Cohen's damaging testimony in order to use it against petitioner at the resentencing trial. Again, this court finds that any prejudice to the jury at the original sentencing trial was alleviated by the provision of a second sentencing trial.

Although the state's use of Dr. Cohen's testimony at the resentencing trial was damaging to the defense, the court cannot find that there was a reasonable probability that the outcome of the resentencing trial would have been different with or without Dr. Cohen's testimony. Petitioner's counsel at the resentencing trial, Mr. J. Roger Thompson, testified that the defense pursued a theory

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that Ginger McIntyre,[10] a friend of petitioner, injected petitioner with an unknown drug before the murders, and it was Ms. McIntyre who actually killed petitioner's parents while petitioner was in a drug-induced state. Resp. Ex. 3F at 347-65, Proceedings of January 21-22, 1992. Petitioner's counsel did not believe that jurors in the region would adopt a psychiatric defense. *Id.* at 368. Moreover, petitioner informed his counsel that he did not commit the crimes, abrogating the possibility of a defense based on an admission of guilt and full apology. *Id.* at 342. Because petitioner pursued a strategy of attacking his role in the murders and Dr. Cohen did not testify regarding petitioner's role but rather petitioner's mental state, assuming that he had in fact killed his parents, the court cannot find that but for Mr. Thomas' performance at the original trial which allowed the prosecution to become aware of Dr. Cohen's testimony, there is a reasonable probability that outcome of the resentencing trial would have been different.

B. Claim VI: Failure to Investigate and Present Evidence Showing That Petitioner's Confessions Were Involuntary

With regard to the original trial, the court again finds that the state habeas court did not apply the two part analysis of *Strickland v. Washington*, 466 U.S. at 668.[11]

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[10] Ms. McIntyre has also been referred to throughout the record as Ms. McEntire.

[11] The state habeas court summarily determined that "Defense counsel presented the only defense determined to be available at the time." Butts R. at 966.

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Accordingly, the court finds that the state habeas court's approach was contrary to clearly established law and proceeds on the merits of the claim. *See Neelley*, 138 F.3d at 927.

Examining the deficient performance prong of *Strickland*, the court finds that Mr. Thomas' representation did not fall below the standard of care. Petitioner argues that Mr. Thomas failed to adequately explore the voluntariness issue through expert testimony. Specifically, petitioner points to the affidavit of Alec J. Whyte, M.D. who conducted a psychiatric examination of petitioner in 1992 and opined that petitioner's "depression, intense fears, vulnerability to suggestion, and psychotic thought processes would further complicate his attempt at compliance during a confession, and would totally destroy its reliability and voluntariness." Resp. Ex. 3G at 466, Aff. of Alec J. Whyte, M.D. Moreover, petitioner points to an affidavit executed by Dr. Cohen in 1991, stating that petitioner's "mental and physical condition would have affected his ability knowingly, intelligently, and voluntarily to waive or assert various constitutional rights." *Id* at 449, Aff. of Sheldon Cohen, M.D. Dr. Cohen further states that he was not asked about these issues during the trial.

As pointed out in this court's discussion of Claim I, Mr. Thomas thought that he was receiving a complete psychiatric evaluation from Dr. Cohen. His conversations with Dr. Cohen did not reveal the possibility that Dr. Cohen could testify as to petitioner's voluntariness. In fact, Mr. Thomas' recollection was that Dr. Cohen told him that petitioner was incredibly unproductive as to his

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mental state around the time of the offense. Resp. Ex. 3E at 217, Proceedings of January 21-22, 1991.

Moreover, the case sub judice differs from other situations where courts have found ineffective assistance of counsel because counsel made no investigation and no objection to defendant's confessions. *See Smith v. Dugger*, 911 F.2d 494 (11th Cir. 1990) (neglecting to question defendant about circumstances of the confession or to investigate the interrogation sessions and being unaware that defendant never signed the waiver of rights form); *Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995) (failing to investigate or file motion to suppress when counsel knew petitioner's admissions and confessions made been made during a period when he was in and out of mental institutions and on and off medication), *overruled on other grounds, Nguyen v. Reynolds*, 131 F.3d 1340 (10th Cir. 1997). In contrast, Mr. Thomas vigorously objected to the introduction of petitioner's confessions the *Jackson-Denno* hearing at the original trial. He questioned every state's witness regarding the possibility that petitioner was under the influence of drugs at the time that he made the incriminating statements. Resp. Ex. 1L at 1643 (Terrell Craven), 1651 (Sheriff Billy Wofford), 1659 (Stanley Thompson), 1670-73 (Frances Wiley), *Jackson-Denno* hearing. In addition, Mr. Thomas put petitioner on the stand to testify that he had taken drugs daily at that time and had even received drugs from a fellow inmate in the jail on the morning of the day that he confessed. *Id.* at 1678-84. The court, however, found that the confessions were voluntarily given because "it was fairly apparent [petitioner] had good reality contact and was aware of

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what was going on throughout the interview."[12] *Id.* at 1706.

Second, as to the prejudice prong, the court cannot find that even if Mr. Thomas presented expert testimony on petitioner's inability to voluntarily waive his rights, there is a reasonable probability that the outcome of the *Jackson-Denno* hearing and consequently the trial would have changed. The expert testimony presented by petitioner relies on petitioner's statements regarding his own drug use during that time, which may or may not have been credible given the fact that petitioner specifically told law enforcement officer Frances Wiley that he had not ingested drugs since the day of the murders, March 19, 1981. Resp. Ex. 1L at 1656 (Statement of March 24, 1981); 1669 (Frances Wiley), *Jackson-Denno*, hearing. The confessions were taken on March 24, 1981.

In addition, in light of the above discussion, the court finds that the state habeas court did not make an unreasonable finding of fact under § 2254(d)(2) and declines to grant habeas relief under this provision.

C. Claim V: Trial Counsel's Conflict of Interest

Petitioner asserts that his original trial counsel, George Thomas, and his partner, Mark Shriver, labored under a conflict of interest during their representation of petitioner which warrants habeas relief under *Cuyler* v

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[12] The state introduced two written waivers of rights as well as testimony on several oral admonitions given to petitioner regarding his rights and petitioner's apparent understanding of his rights.

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Sullivan, 446 U.S. 335 (1980). Specifically, petitioner argues that his trial counsel's representation was adversely affected by three conflicts of interest: (1) Mr. Shriver had filed a petition in probate court for Dianne Romine on behalf of her minor children; (2) Mr. Thomas told petitioner that he would provide better representation if he was paid instead of being appointed; (3) Dianne Romine was represented by Mr. Thomas in a hearing in which her sentence for unrelated crimes was reduced. With regard to these contentions, the state habeas court found that petitioner failed to show that Mr. Thomas and Mr. Shriver were actually representing Dianne Romine at the time of the original trial and although Mr. Thomas told Petitioner what his normal fee would have been, he did not tell petitioner that he would render better assistance if he was being paid. Butts R. 960, 965. Petitioner asserts that the state habeas court erred in its ruling that no actual conflict of interest existed that adversely affected trial counsel's representation.

The prevailing Supreme Court decisions at the time the state habeas court rendered its decisions were *Cuyler v. Sullivan*, 446 U.S. at 335, and *Burger v. Kemp*, 483 U.S. 776 (1987). In *Cuyler*, the Supreme Court held that habeas relief is warranted if counsel "actively represented conflicting interests" and "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 350, 348. However, a defendant need not establish prejudice to obtain relief as in other types of ineffective assistance of counsel claims. *See Strickland*, 466 U.S. at 692; *Cuyler*, 446 U.S. at 349-50. In *Cuyler*, counsel represented co-defendants and elected at the trial of one of them to rest the defense without putting on any evidence.

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The Supreme Court remanded to determine whether counsel's conflict of interest affected his performance.

In *Burger*, the Supreme Court held that the appointment of two partners to represent coindictees in their respective trials did not produce an actual conflict of interest that adversely affected petitioner's representation. 483 U.S. at 784-85. Petitioner argued that his trial counsel's conflict of interest prevented him from pursuing a plea agreement for a life sentence and to present a "lesser culpability" argument in his appellate brief. The Court first deferred to the lower court's findings that no actual conflict of interest existed, reasoning that a finding of actual conflict would require the Court to attribute the motivation of petitioner's counsel not to pursue a certain issue on appeal to the fact that his law partner was representing the coindictee. *Id.* The Court then found that even if an actual conflict of interest existed, it did not harm the lawyer's advocacy. The facts showed that the prosecutor rejected counsel's offers to plea bargain. *Id.* at 785.

In the case sub judice, the state habeas court applied the test outlined in *Cuyler* and reaffirmed in *Strickland* and *Burger*. Because the facts of this case are distinguishable from *Cuyler* and *Burger*, this court finds that the state habeas court's decision was not contrary to clearly established federal law. The remaining issue is whether the state habeas court unreasonably applied Supreme Court precedent in finding no actual conflict of interest warranted habeas relief. The court reemphasizes that "the state court decision must stand unless it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect." *Neeley*, 138 F.3d at 924.

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First, with regard to Mr. Shriver's representation of Dianne Romine, the court finds that even if an actual conflict of interest existed, it did not adversely affect Mr. Shriver's representation of the petitioner. Mr. Shriver attempted to file a petition in the Probate Court of Pickens County on behalf of Dianne Romine, as next friend of her two minor children, to create a fund from their grandparents' estate for their support and maintenance. Resp. Ex. 3G at 635-36. In a letter dated September 3, 1981, Judge D. Rodney Gibson returned the petition because of the conflict of interest. *Id.* at 638. Mr. Shriver then informed Ms. Romine in a letter dated September 4, 1981 that he was unable to help her children until after the trial. *Id.* at 639. Mr. Shriver testified at the habeas hearing that Judge Gibson apparently rejected the petition without formally filing and dismissing it. Resp. Ex. 3E at 158, Proceedings of January 21-22, 1992. The petition in the record has no stamp indicating that it was ever received or filed by the clerk's office. Mr. Shriver also testified that Ms. Romine never formally retained him, and he did not perform any other services on Ms. Romine's behalf. *Id.* at 179.

During this same time period, Mr. Thomas, Mr. Shriver's law partner, was representing petitioner. Mr. Shriver assisted in that representation by drafting many of the pretrial motions, discussing the case with Mr. Thomas, doing some of the voire dire at trial, and cross examining one or two minor witnesses. *Id.* at 160, 185. Mr. Thomas had just graduated from law school in June of 1981. *Id.* at 159.

In both *Cuyler* and *Burger*, the Supreme Court emphasized petitioner's burden of showing that the conflict of

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interest adversely affected his representation. Because petitioner has not pointed to any decisions Mr. Shriver made in the course of his representation that may have been affected by his representation of Ms. Romine, this court declines to find any adverse effect on petitioner's representation because of Mr. Shriver's brief representation of Ms. Romine.

Second, as for the allegation that Mr. Thomas' profit motive impaired his representation, the court finds that claim to be without merit. Respondent relies on an exchange between petitioner and the trial court at a hearing on June 19, 1981. Specifically, the court questioned petitioner about his satisfaction with his counsel and petitioner claimed that Mr. Thomas told him and his wife that Mr. Thomas could provide a "better trial" if he was paid $25,000. Resp. Ex. 1A at 23-24, Hearing of June 19, 1981. Upon the court's further inquiry, however, petitioner admitted that Mr. Thomas did not tell him that he would be able to do more for petitioner if he was being paid for his services. *Id.* at 25. Mr. Thomas then explained to the court that the conversations that petitioner was referring to involved the hiring of investigators and psychiatrists to aid in his defense. *Id.* at 29. Mr. Thomas had advised petitioner that it would be wise, if he had the funds, to hire his own investigators and psychiatrists. *Id.*

In addition at the state habeas court, Mr. Thomas testified that he did not offer to provide better representation for a fee. Resp. Ex. 3E at 234-35, Proceedings of January 21-22, 1992. The state habeas court credited Mr. Thomas' testimony and found that "Mr. Thomas did not tell petitioner that for $25,000 he, Thomas, would render better and more effective assistance of counsel." Butts R

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965. Instead, the court found that petitioner asked Mr. Thomas about his normal fee, and Mr. Thomas responded. *Id.*

This court defers to the state habeas court's fact finding and rules that no potential or actual conflict of interest existed between petitioner and Mr. Thomas. Moreover, even if an actual conflict of interest did exist, petitioner has not shown any adverse effect on his representation due to this conflict. *See Cuyler*, 446 S. Ct. at 348. Accordingly petitioner's writ of habeas court on this ground is denied.

Finally, the court finds petitioner's claim that Mr. Thomas labored under conflict of interest in representing both petitioner and his wife to be more troubling. Petitioner asserts that Mr. Thomas' representation of Dianne Romine inhibited him from impeaching Ms. Romine on cross-examination regarding her prior convictions and an agreement with the state to reduce charges against her in exchange for her testimony. Respondent urges this court to defer to the Butts County Court's finding that there was no deal with Ms. Romine and petitioner failed to prove that Mr. Thomas represented Ms. Romine at the time of the trial.

With regard to whether Mr. Thomas labored under an actual conflict of interest, the state habeas court found that Mr. Thomas did not act under an actual conflict of interest. Butts R. 960. Mr. Thomas recalled at the state habeas corpus proceedings that he represented Ms. Romine *after* petitioner's trial when he encountered her while incarcerated in jail on a contempt charge. Resp. Ex. 3E at 226-29, Proceedings of January 21-22, 1992. He later

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admitted that his recollection was not clear. *Id.* at 246. In 1992, Mr. Thomas did not have a file for Ms. Romine, but that file may have been included in petitioner's file, which he had sent to petitioner's next attorney, Mr. Thompson. *Id.* at 229.

However, the record shows that Mr. Thomas in fact represented Ms. Romine at her sentence reduction on March 12, 1982, two weeks before petitioner's trial began. Resp. Ex. 3G, at 634, Order of March 12, 1982. Ms. Romine had previously been sentenced to ten years, five to serve and the balance on probation for various forgery charges. *Id.* at 728, Transcript of Dianne Romine's Sentencing, February 15, 1982. The sentence was reduced to one year to serve with the remaining nine years on probation. *Id.* at 634.

In spite of the close proximity between Mr. Thomas' representation of Ms. Romine and petitioner's trial, the court is required to presume that the state habeas court's determination that no evidence showed that Mr. Thomas was representing Ms. Romine at the time of the original trial is correct. Batts R. 960. The new § 2254(e)(1) of the AEDPA mandates:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(emphasis added).

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Petitioner attempts to rebut that presumption of correctness by arguing that the documentary evidence submitted to the state habeas court showed that Mr. Thomas was representing Ms. Romine at the time of petitioner's trial and that even if Ms. Romine's case was over, Mr. Thomas' duty of loyalty to Ms. Romine continued. A review of the order reducing Ms. Romine's sentence shows that the reduction occurred on March 12, 1982. If Mr. Thomas representation was limited to that particular hearing, then the Burns County Court could reasonably find that Mr. Thomas' representation of Ms. Romine ended at that hearing.[13] Furthermore, under *Cuyler*, petitioner must demonstrate that his counsel "actively represented conflicting interests." *Cuyler*, 446 U.S. at 350. The fact that Mr. Thomas was laboring under a continuing duty of loyalty without more is not enough to overcome the presumption of correctness accorded to the state habeas court's finding.[14]

Given that the state habeas court found that Mr. Thomas' representation of Ms. Romine had terminated prior to petitioner's trial, the court will treat the claim as

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[13] This inference is reasonable because Ms. Romine proceeded pro se at her first sentencing, which occurred a month before her sentence reduction. Resp. Ex. 3G at 673, Transcript of February 15, 1982 Sentencing. Apparently, Mr. Thomas' representation began after that date and may have ended on the date of the second hearing.

[14] Indeed, the Supreme Court has held that simultaneous representation of co-defendants does not in and of itself create an actual conflict of interest. *Burger*, 483 U.S. at 783; *Cuyler*, 446 U.S. at 348; *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978).

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a successive representation situation.[15] In applying *Cuyler* and *Strickland*, the Eleventh Circuit has ruled that:

> A conflict may arise from a lawyer's simultaneous or successive representation of adverse interests. Whether the representation is simultaneous or successive does not conclusively determine the question of actual conflict, although it is generally easier to prove actual conflict arising from simultaneous representation than from successive representation.

McConico v. Alabama, 919 F.2d 1543, 1546 (11th Cir. 1990); *see also Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988); *United States v. Agosto*, 675 F.2d 965, 967 n.5 (8th Cir. 1982); *Simmons v. A.L. Lockhart*, 709 F. Supp. 1457, 1469 (E.D. Ark. 1989).

Because *Cuyler* and *Burger* address conflicts inherent in a simultaneous representation rather than in the successive representation situation, the court finds it necessary to consider lower court opinions in determining whether the state habeas court applied *Cuyler* and *Burger* reasonably to the facts of this case. "An attorney who cross-examines a former client inherently encounters divided loyalties." *Porter v. Singletary*, 14 F.3d 554, 561

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[15] The court notes that the month at most that Mr. Thomas represented petitioner and Ms. Romine constitutes a simultaneous representation situation. Petitioner, though, does not allege any wrongdoing by Mr. Thomas during that time period. Instead, petitioner focuses on acts committed by Mr. Thomas at his trial. Because the trial occurred after Mr. Thomas' representation of Ms. Romine ended, a successive-representation characterization is warranted.

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(11th Cir. 1994). However, a "possible or merely hypothetical conflict does not suffice." *Id.* at 560. "Instead, petitioner must be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party." *Id.* In addition, petitioner "must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Smith v. White*, 815 F.2d 1401, 1404-05 (11th Cir. 1987) (quoting *United States v. Barham*, 724 F.2d 1529, 1532 (11th Cir. 1984)). "[I]f the defendant fails to show that either (1) counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of defendant or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case, then defendant has not come even close to showing 'inconsistent interests.' " *Id.* at 1405.

In *Smith*, the defense counsel had represented the prosecution's witness three months prior to defense counsel's appointment to defendant's case. The court found the witness' marijuana case was not substantially related to defendant's attempted murder and robbery trials. The court rejected defendant's conclusory allegation that defense counsel failed to attribute the crimes to the witness. *Smith*, 815 F.2d at 1406.

Additionally, in *United States v. Barham*, 724 F.2d at 1529, the court considered whether defense counsel's representation of a prosecution witness in an unrelated civil matter during defendant's trial was an impermissible conflict of interest warranting habeas relief. Though

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frowning on the practice, the court found that the prosecution witness' testimony was insignificant to the state's case and that the only decision defense counsel made that potentially affected both clients was whether to cross examine the witness in a friendly or hostile manner. The court found no evidence that defense counsel "made a choice between possible actions that would or could have been helpful to one client and harmful to the other." *Id.* at 1533.

The court finds that petitioner has not made a sufficient showing that Mr. Thomas's representation of Ms. Romine was substantially related to petitioner's case or that Mr. Thomas learned any confidential information that was relevant to petitioner's case in the course of his representation of Ms. Romine. Like the witnesses in *Smith* and *Barham*, Ms. Romine's sentence reduction on her three forgery convictions bore no substantial relationship to petitioner's trial for murder and armed robbery. In addition, the court finds no evidence that Mr. Thomas learned any confidential information about petitioner's case through his representation of Ms. Romine.[16] The only potential connection or information pertinent to petitioner's case is petitioner's allegation that Ms. Romine cut a deal with the state to reduce her sentence, which Mr. Thomas did not bring up on her cross examination. However, the court finds petitioner's assertions regarding Mr. Thomas' lack of cross-examination on the possibility of a deal with the state to be without foundation. The state habeas court found that the record showed

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[16] Ms. Romine's prior convictions are not considered confidential information as they are in the public record.

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"without question that Dianne Romine had no deal with the state." Butts R. 963. This court agrees.

At the original trial Mr. Thomas filed two motions with the trial court for the state to reveal any deals with Dianne Romine. Resp. Ex. 1 at 113 (Motion of July 21, 1981); 320 (Renewed Motion of March 29, 1982). The court heard argument on the first motion on August 5, 1981. At the hearing, the district attorney handling the case, Mr. Rafe Banks, stated that in his knowledge the district attorney and the GBI had made no deals with Ms. Romine. Resp. Ex. 1C at 38, Hearing of August 5, 1981. Ms. Romine testified that the state had made no deal with her at that time. *Id.* at 60. The court ordered the state to reveal any deals and placed the state under a continuing obligation to reveal any deal with Ms. Romine. *Id.* at 62-63.

The court heard argument on the renewed motion to reveal any deal on March 29, 1982. The renewed motion was based on the fact that Ms. Romine's sentence in an unrelated case had been reduced. Resp. Ex. 1G at 52, Proceedings of March 29, 1982. At that hearing, Judge Frank Mills, who was also responsible for reducing Ms. Romine's sentence, explained that he did so independently from the district attorney's office and that in his personal knowledge there was no deal with Ms. Romine.[17] *Id.* at 55-56. In addition, Mr. George Weaver

[17] Judge Mills explained that he reduced Ms. Romine's sentence based on letters he received on her behalf and on the testimony of a co-defendant who stated that Ms. Romine was not as culpable in committing the forgeries as the co-defendant had depicted at another hearing. *Id.* at 54-55.

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who was the assistant district attorney at the time of the original trial and who assisted Mr. Banks in preparing for trial subsequently denied at the state habeas hearing that the state had made any deal with Ms. Romine. Resp. Ex. 3F at 305, Proceedings of January 21-22, 1992.

Respondent relies on the impressions of Mark Shriver who recalled that the district attorney's office had made a deal with the state and the fact that Mr. Thomas had contacted George Weaver about any deals with Ms. Romine. A review of Mr. Shriver's testimony shows, however, that Mr. Thomas primarily dealt with Ms. Romine. Mr. Shriver did not recall any discussions with Mr. Thomas about bringing the deal before the jury. *Id.* at 197. Mr. Thomas in turn testified that he has also heard that some deal or arrangement was reached between Ms. Romine and the state, but he was never able to substantiate the allegations. *Id.* at 237.

Because petitioner has not demonstrated that Ms. Romine testified pursuant to a deal with the state and the record indicates that Judge Mills reduced her sentences for a reason unrelated to petitioner's case, the court declines to find that any actual conflict of interest that Mr. Thomas had adversely affected his cross-examination of Ms. Romine in this regard. Mr. Thomas had no factual basis on which to question Ms. Romine about a deal with the state.

In contrast, Mr. Thomas' failure to cross examine Ms. Romine about her prior convictions causes the court some concern. In applying *Cuyler*, the Eleventh Circuit has held that an actual conflict of interest occurs if a criminal defense attorney is forced to choose between discrediting

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a former client who testifies as a prosecution witness or foregoing vigorous cross examination in an attempt to preserve the witness' attorney/client privilege. *Porter v. Wainwright*, 805 F.2d 930 (11th Cir. 1986); *see McConico*, 919 F.2d at 1547. The state habeas court found that "[i]n light of the record in this case it is just as reasonable to assume that ten years ago Mr. Thomas had a reason for acting as he did as it is to assume that in the absence of any explanation that the failure to impeach a certain witness was error. Petitioner has the burden of proof and has failed to carry it in this regard." Butts R. at 961.

The record demonstrates that Mr. Thomas had an undisclosed reason for not impeaching Ms. Romine with her prior convictions. At the original trial, Ms. Romine was called by the state and testified about petitioner's drug use, his adultery, that petitioner had burned items in a trash barrel after the murders, and that upon petitioner's request, she retrieved some items from his automobile after he was arrested. On cross examination, Mr. Thomas elicited favorable testimony regarding petitioner's past and his relationship with his children. Mr. Thomas also questioned Ms. Romine about petitioner's relationship with his parents and Ginger McIntyre and petitioner's drug use. The record does not indicate that Mr. Thomas impeached Ms. Romine on any matter.

When Mr. Thomas finished his cross examination, the trial judge questioned Mr. Thomas outside of the presence of the jury regarding his failure to impeach Ms. Romine with her prior convictions. Resp. Ex. 1L at 1603, Proceedings of April 1, 1982. Mr. Thomas responded that he had obtained certified copies of Ms. Romine's convictions and had not made a decision whether to use them.

Id. Mr. Thomas reserved the right to call Ms. Romine again to question her about the convictions, but he did not. When questioned at the state habeas proceeding, Mr. Thomas could not recall why he did not impeach Ms. Romine on her convictions. Resp. Ex. 3E at 244, Proceedings of January 21-22, 1992. *Cf. Burger*, 483 U.S. at 786 (noting counsel's uncontradicted testimony at the habeas hearing that he in no way tailored his strategy to protect the co-defendant); *Porter v. Singletary*, 14 F.3d at 561 (same); *Simmons*, 709 F. Supp. at 1470 (crediting counsel's explanation for his failure to impeach).

Mr. Thomas did however, offer some explanation of his motive in representing Ms. Romine.[18] He testified that he only worked on her case in an attempt "to enlist her aid to find out what happened in Larry [Romine]'s case." Resp. Ex. 3E at 229, Proceedings of January 21-22, 1992. Ms. Romine had been uncooperative in Mr. Thomas' investigation into petitioner's case. *Id.* at 205. The state habeas court apparently credited this testimony. Butts R. 959-60.

Furthermore in determining whether an actual conflict of interest exists it is helpful to consider the parties' respective burdens. The *Smith* court explained that the habeas petitioner bears the burden to show his conviction was unconstitutional. *Smith*, 815 F.2d at 1406. "The federal court has great respect for State court convictions, and will not lightly set such a conviction aside. In a

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[18] Again, the court notes that Mr. Thomas' testimony is inconsistent with the documentary evidence presented in that he believed that he had represented Ms. Romine after petitioner's case was over but before the appeal.

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habeas proceeding, the federal court presumes that a State court conviction is constitutional and lawful, unless and until petitioner proves the contrary by a preponderance of the evidence." *Id.* The plain language and legislative history of the recently passed AEDPA also evidences congressional intent for federal courts to defer to state court judgments.[9] *See* 28 U.S.C. § 2254(d) (creating "contrary to" and "unreasonable application" standard of review); H.R. Conf. Rep. No. 104-518, at 255 (1996) (explaining that the AEDPA "requires deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law.").

With these standards in mind, the court declines to hold that the state habeas court's finding that Mr. Thomas' representation of Ms. Romine was an actual conflict that adversely affected petitioner's representation

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[9] The court notes some tension between the deference accorded to state court judgments mandated by Congress and language in Supreme Court opinions suggesting that in capital cases, the court is to engage in a higher level of scrutiny. *See Burger*, 483 U.S. at 785 ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."); *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) ("Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.").

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was an unreasonable application of federal law. To do so would require the court to attribute Mr. Thomas' failure to impeach to his prior representation of Ms. Romine. The state habeas court apparently believed Mr. Thomas acted for an unknown, strategic reason. *See Burger*, 483 U.S. at 784-855 (refusing to attribute defense counsel's motivation in not making an argument to the fact that counsel's partner was representing the co-defendant when the lower courts had determined that counsel possessed the appropriate motivation). Moreover, this court considers it unlikely Mr. Thomas' minimal prior representation of Ms. Romine infected his strategy on cross examination when Mr. Thomas was prepared to impeach her with certified copies of her convictions and retained the option of recalling Ms. Romine to impeach her but ultimately decided not to do so.

Accordingly, petitioner's writ of habeas corpus on this claim is hereby denied.

V. Claim III § 1: Resentencing Counsel's Failure to Adequately Investigate, Prepare and Present Mental Health Evidence and Issues

Petitioner argues that resentencing counsel rendered ineffective assistance by deciding not to pursue a psychiatric defense, not challenging the voluntariness of petitioner's confessions, and failing to prepare for Dr. Cohen's testimony when he knew that Dr. Cohen would be called as a state's witness. As discussed *supra*, the prevailing Supreme Court decision in this area is *Strickland v. Washington*, 466 U.S. at 668. A review of the order denying state habeas relief reveals that the state habeas

court discussed and applied *Strickland's* two prong test for finding ineffective assistance of counsel. Butts R. 943-45. Thus, this court finds that the state court did not act contrary to clearly established federal law. The remaining issue is whether the state habeas court unreasonably applied *Strickland* to this claim.

Regarding the deficient performance prong, the court finds that the state habeas court was not unreasonable in finding that Mr. Thompson and petitioner made the strategic decision, based on their theory of defense, not to utilize psychiatric testimony at the resentencing trial." Butts R. at 955. First, the court finds that Mr. Thompson's decision not to investigate or pursue mental health issues was an informed strategic choice. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.*

Based on the record, the court finds that it was reasonable for the state habeas court to find that Mr. Thompson's representation was not deficient. Mr. Thompson made an informed strategic decision after conferring with petitioner and based on Mr. Thompson's views of what a potential jury in that religion would accept. After his appointment, Mr. Thompson prepared to represent petitioner by reading the file, interviewing witnesses, visiting the crime scene, meeting with petitioner three or four times a week, and combing through the district attorney's file. Resp. Ex. 3F at 335-38, Testimony

of J. Roger Thompson. He spoke to petitioner at length about presenting a psychiatric defense, both eventually agreeing that a jury in Pickens County would not "buy a psychiatric defense of any kind." *Id.* at 343. In addition, Mr. Thompson crafted the defense strategy based on petitioner's recollection of the events – that Ginger McIntyre injected petitioner with an unknown drug that made him involuntarily intoxicated and that although petitioner was present at the murders, it was Ginger McIntyre who actually shot and killed the Romines. *Id.* at 342. In Mr. Thompson's view, presenting a psychiatric defense was incompatible with the defense strategy. *Id.* at 342-43.

Second, the state habeas court found and this court agrees that Mr. Thompson made a strategic decision not to challenge the voluntariness of petitioner's confessions. As a part of the defense strategy, Mr. Thompson argued that petitioner made the confessions to protect Ginger McIntyre. Challenging the voluntariness of the confessions was not compatible with that tactic. *Id.* at 952, 954. At the resentencing trial, Mr. Thompson elicited testimony from Dr. Cohen on cross-examination that people confess to protect the ones they love and that a confession does not necessarily mean that a person actually committed the crime. Resp. Ex. 2Q at 2482, Testimony of Dr. Sheldon Cohen.

Third, with respect to the contention that Mr. Thompson did not sufficiently prepare for Dr. Cohen's testimony after learning that the state was going to present him as a witness, the court finds that Mr. Thompson adequately familiarized himself with Dr. Cohen's opinion prior to Dr. Cohen taking the stand. Mr. Thompson testified that he reviewed Dr. Cohen's report when he first

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was appointed to take petitioner's case. Mr. Thompson later interviewed Dr. Cohen prior to the trial.[20] Resp. Ex. 3F at 363, Testimony of J. Roger Thompson. In addition, Mr. Thompson's strategy was to rely on his cross-examination of Dr. Cohen to steer his testimony in the manner most consistent with the defense strategy. *Id.* at 364.

Because this court has ruled that the state habeas court did not unreasonably apply *Strickland* in finding that Mr. Thompson's performance at the resentencing trial was not deficient, petitioner's writ of habeas corpus on this ground is denied.

VI. Claim X Petitioner's Mental Retardation

Petitioner asserts that because he is mentally retarded and thus ineligible for the death penalty under Georgia law, his execution would deprive him of his rights to due process and equal protection in violation of the Sixth, Eighth, and Fourteenth Amendments. First, the court reemphasizes its holding that petitioner's Sixth Amendment claim is procedurally barred. Order of May 29, 1997 at 28. Second, petitioner's claim under the Eighth

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[20] Although Mr. Thompson may not have been as prepared as he ordinarily would have been with regard to Dr. Cohen's testimony, Aff. of Janice Thompson ¶ 6, a reason is that Mr. Thompson and the district attorney may have had an informal agreement that the district attorney was not going to call Dr. Cohen to the stand. *Id.* The record from the resentencing trial indicates that Dr. Cohen was not included on the original witness list disclosed by the state. Instead, district attorney William H. Boggs instructed Mr. Thompson by letter dated August 15, 1985 to add Dr. Cohen onto the witness list. Resp. Ex. 2A at 1322. The resentencing trial began on August 16, 1985.

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Amendment is without merit. The Supreme Court has ruled that the execution of mentally retarded persons for capital offenses does not violate the Eighth Amendment of the Federal Constitution. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989). The remaining issue is whether petitioner's Fourteenth Amendment due process and equal protection rights have been violated.

After careful review of the record and the applicable law, the court cannot find that petitioner's Fourteenth Amendment rights have been violated. Petitioner asserts that the state habeas court erred by not ordering a mental retardation trial after petitioner presented evidence raising a genuine issue of his mental retardation. The Georgia Supreme Court has recognized that the execution of mentally retarded persons violates the Georgia Constitution's prohibition against cruel and unusual punishment. *Fleming v. Zant*, 259 Ga. 687, 690 (1989). Limiting its holding to defendants who were tried before the effective date of the Georgia statutory provision allowing a finding of guilty but mentally retarded, the *Fleming* court outlined the appropriate procedure to follow in determining mental retardation on collateral review. Specifically, the court stated:

> When a defendant who was tried before the effective date of the O.C.G.A § 17-7-131(j) alleges in a petition for habeas corpus that he or she is mentally retarded, the habeas corpus court must first determine whether the petitioner has presented sufficient credible evidence, which must include at least one expert diagnosis of mental retardation, to create a genuine issue regarding petitioner's retardation. The court in its discretion, may hold a hearing

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> on the issue, or may make the determination based on affidavits, depositions, documents, etc. If, after examining the evidence, the habeas corpus court finds that there is a genuine issue, a writ shall be granted for the limited purpose of conducting a trial on the issue of retardation only.

Id. at 691. Petitioner was tried before the July 1, 1988 effective date of the statute.

It is well established that "it is not in the province of a federal habeas court to reexamine state-court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Thus, in the case sub judice, the court must consider whether the Georgia Supreme Court's decision in *Fleming* creates a federal constitutional right, and, if so, whether petitioner received all the process he was due in the protection of that interest.

In that regard, the court finds that even if *Fleming* creates a constitutionally protected liberty interest, Georgia's procedure for reviewing mental retardation issues on collateral review does not violate due process. Without asserting that the actual process is deficient, petitioner argues that the state habeas court erred in not finding a genuine issue of fact regarding his retardation. This court is precluded form revisiting the state habeas court's determination under *Estelle v. McGuire*, 502 U.S. at 67-68; *see also Ford v. Wainwright*, 477 U.S. 399, 430 (1986) (O'Connor J., concurring in the result in part and dissenting in part) (explaining that once the federal habeas court

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has determined that the state's procedures were adequate, "a federal court has no authority to secondguess a State's substantive competency determination.").

Moreover, a review of the Butts County Record shows that the state habeas court adhered to the procedure outlined in *Fleming* in finding no genuine issue of mental retardation. Butts R. 184, Order of February 6, 1991 denying petitioner's motion for a remand and retrial on the issue of mental retardation; Butts R. 299, Order of July 22, 1991 denying petitioner's renewed motion for retardation trial. Petitioner then filed for a certificate of immediate review to the Supreme Court of Georgia, which was denied on October 2, 1991

Accordingly, petitioner's writ of habeas corpus on this claim is hereby DENIED.

VII. Claim VII: Prosecution's Closing Argument at the Guilt/Innocence Phase of the Original Trial

Petitioner asserts that the prosecution's reference to religion in the closing argument to the guilt/innocence phase of petitioner's trial violates due process under *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) and *Darden v. Wainwright*, 477 U.S. 168 (1986). Specifically, petitioner complains about a reference to a picture of the Last Supper that was located at the murder scene. In reviewing the evidence, the prosecutor argued:

> State's Exhibit No. 14 is a photograph that shows this corner of the bedroom. It shows the table with the wadding, and as a real point of irony, I want you to notice what's on the wall,

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> what's hanging on the wall. It's a picture of the Last Supper.
>
> Larry Romine stepped out of that doorway from a distance of four feet, probably looked his mother smack in the eye. She was shot right in the front, right in the chest and blew her guts clean across the room all over that picture of the Last Supper. I hope it gives you goose bumps; it does me.

Resp. Ex. 1M at 1951, Proceedings of April 2, 1982. Respondent requests that this court defer to the state habeas court's finding that this reference was not improper and did not violate *Donnelly*. Butts R. 945-46.

Donnelly and *Darden* set out the clearly established law at the time the state habeas court considered this claim. "It is not enough that the prosecutor's remarks were undesirable or even universally condemned.' " *Darden*, 477 U.S. at 181. Instead, prosecutorial conduct that does not infringe a specific constitutional right, such as the privilege against self-incrimination, does not result in a constitutional violation unless the conduct "infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643.

In *Darden*, the prosecution in response to defense counsel's argument attempted to place some of the blame for the crime on the division of corrections who had allowed the defendant to go on a weekend furlough, implied that the death penalty was the only way to stop similar acts in the future, and referred to the defendant as an animal. *Darden*, 477 U.S. at 179-80. The Court held that these comments did not deprive defendant of a fair trial because they did not manipulate or misstate the evidence

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and were responsive to defense arguments, the court instructed the jury that the closing arguments were not evidence, and defense counsel was able to use the opportunity for rebuttal very effectively. *Id.* at 182.

Proceeding to the second step of the *Neelley* analysis, the court finds that the state habeas court's decision was not contrary to clearly established federal law because it did analyze the claim in light of *Donnelly*. Moreover, the facts of *Donnelly* and *Darden* are sufficiently dissimilar so as not to mandate a similar ruling. Butts R. 946-47. The remaining issue then is whether the state habeas court unreasonably applied *Donnelly*. Petitioner argues that the prosecution is barred from making an appeal solely to the passion or prejudice of the jury, *see e.g. Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991), and that references to religion have been condemned. *See e.g. United States v. Giry*, 818 F.2d 120 (1st Cir. 1987).

The court finds that the state habeas court did not unreasonably apply *Donnelly*. Like the prosecutor in *Darden*, the prosecutor in the instant case did not manipulate or misstate the evidence. Moreover, in *Cobb v. Wainwright*, 609 F.2d 754 (5th Cir. 1980),[21] the court in applying *Donnelly* held that the prosecutor's comments, including an argument that no biblical reason existed to show mercy to the defendants, did not infect the trial with unfairness as to make the conviction a denial of due process. The *Cobb* court distinguished cases where the prosecutor attempted to mislead the jury by alluding to

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[21] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as precedent all Fifth Circuit decisions rendered on or before September 30, 1981.

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nonexistent evidence and that defense counsel had a change to rebut and dissipate any prejudice.

The instant case presents an even weaker argument for the petitioner. A review of the closing augment shows that the prosecutor was merely reviewing the evidence submitted in the case against petitioner, which included a photograph of the bedroom where Mrs. Romine was killed. Resp. Ex. 1M at 1951. The photograph showed Mrs. Romine's blood spattered on a picture of the Last Supper that was hanging on the wall of her bedroom. *Id.* Because photographs of a crime scene are admissible even if they contain depictions of religious literature, *Allen v. State*, 253 Ga. 390, 393 (1984), the prosecutor's comments were not made solely to appeal to the passion or prejudice of the jury and were not irrelevant reference to religion. *Cf. Cunningham*, 928 F.2d at 1006 (expressing disapproval of prosecutor's numerous appeals to religious symbols and beliefs, including a comparison of defendant to Judas Iscariot); *Giry*, 818 F.2d at 133 (finding that complete irrelevance of reference to Peter's denial of Christ suggested that its sole purpose was to inflame the jury).

Accordingly, petitioner's writ of habeas corpus on this ground is hereby denied.

VIII. Claim VIII: Prosecutor Closing Argument at the Resentencing Trial

Petitioner asserts that by relying on biblical authority to justify imposition of the death penalty, the state, in a trial permeated with religion deprived petitioner of his

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rights under the Fifth, Eighth, and Fourteenth Amendments. Respondent urges this court to defer to the state habeas court's ruling that this claim is procedurally defaulted under O.C.G.A. § 9-14-48(d) which requires the state habeas court to "consider whether the petitioner made a timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal."

Although the state habeas court denied the claim on procedural default grounds, if this court finds that the Georgia Supreme Court decided the issue on the merits on direct appeal rather than relying on procedural default, this court is not precluded from considering petitioner's claim. *See Davis v. Singletary*, 119 F.3d 1471, 1479 (11th Cir. 1997) ("Once a state supreme court on direct review has eschewed a procedural default bar and based its disposition solely on a rejection of the merits of a claim, no amount of procedural bar holdings as to that claim in future proceedings will suffice to bar the claim from federal habeas review."). The *Davis* court cautioned that subsequent state court pronouncements on the issue may still be considered to clarify an earlier ambiguous holding. *Id.* at 1479 n.4.

The Georgia Supreme Court could have relied on § 9-14-48(d) in denying petitioner's constitutional claim based on the prosecutor's closing argument. Petitioner's counsel did not object to the prosecutor's closing argument at the resentencing trial. *See* Resp. Ex. 2R at 2750-2802, Proceedings of August 28, 1985. However, in ground 13 of his appellate brief, petitioner claimed that the prosecutor's closing argument violated O.C.G.A. § 17-10-35(c)(1), which provided that a sentence of death could not be imposed under the influence of "passion,

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prejudice or any other arbitrary factor" and that the argument made petitioner's trial "fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* In addition, petitioner cited *Caldwell v. Mississippi*, 472 U.S. 320 (1985), for the proposition that the jury's sense of responsibility for imposing the death penalty cannot be lessened or diminished. Resp. Ex. 2S at 96, Brief of Appellant. The Georgia Supreme Court rejected this claim. *Romine v. State*, 256 Ga. at 533. Although noting that this claim was first raised on appeal, the Georgia Supreme Court did not specifically invoke procedural default, concluding after a review of the transcript that the prosecutor did not seriously overstep his bounds. *Id.*

The court finds that the Georgia Supreme Court decided the issue on the merits. In *Cumbie v. Singletary*, 991 F.2d 715, 720 (11th Cir. 1993), the state court did not specifically address the Confrontation Clause issue, simply stating: "We find no merit to the remaining issues." The Eleventh Circuit held that since the state court did not specifically refuse to consider the issue based on defendant's failure to object, the federal court was not procedurally barred from considering the claim.

Similarly, the Georgia Supreme Court did not expressly deny petitioner's claim on direct appeal from the failure to object to the prosecutor's argument. *See Harris*, 489 U.S. at 262 (requiring state court to enunciate "clearly and expressly" that this judgment rests on a state procedural bar). Instead, the Court stated that it had reviewed the closing argument in its entirety and concluded that "nowhere did the prosecutor seriously overstep his bounds. We find no reversible error." *Romine*, 256

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Ga. at 533 (citing five Georgia cases denying petitioner's claims of prosecutorial misconduct during closing argument). Accordingly, the court rules that petitioner has not procedurally defaulted on the portion of the claim relating to the prosecutor's closing argument. However, to the extent that petitioner claims constitutional error based on other portions of his resentencing trial, the claim is procedurally defaulted under O.C.G.A. § 9-14-48(d).[22]

Turning to the merits, because the Georgia Supreme Court failed to address or apply the correct legal principles of federal law in its decision, the court finds that the decision is contrary to clearly established federal law. *See Neelley*, 138 F.3d at 923. The court must now independently consider the merits of the claim. *Id.* at 927.

Petitioner asserts that the injection of religion into the resentencing proceedings violated his rights under the Fifth, Eighth and Fourteenth Amendments. Near the end of his closing argument, the prosecutor stated:

> I apologize for showing those pictures again, but you need to see that and realize what's there. This is the debris we're talking about. He splattered his mother's living tissue, her heart

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[22] Specifically petitioner complains about the fact that jurors were lodged at the Baptist Assembly and the judge treated Sunday as a day of rest, arranged for the jurors to receive their Bibles, and instructed jurors that they could not attend church services of their own choosing but were required to stay at the Assembly. In addition, petitioner points to the prosecutor's cross-examination of petitioner's grandfather, Ralph Romine, in which Mr. Romine admitted that he was familiar with the New Testament passage requiring those who do not honor their father and mother to be put to death.

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> still throbbing, pumping, under the excitement her adrenalin flowing. She's living for some two to fifteen minutes more and it sprays it all over that picture of the Last Supper of Christ sitting with the disciples. You know, this home, this home that he'd grown up in where Christian values were preached and taught and that's the only – that's the reason he shot them, one of the reasons, that they were too strict.

Resp. Ex. 2R at 2798. Counsel then closed with the following exhortation to the jury:

> I ask you, ladies and gentlemen, to go out there and render a verdict that speaks the truth, and that is one that complies not only with the law of man, the law of God and when the counsel asks you about the, uh, whether there is a Biblical basis for the death penalty and about turning the other cheek, uh I want to submit to you Matthew 15 verse 4. And this, you know, this is New Testament stuff. That's where it says turn the other cheek too. "For God said, respect your father and your mother. And whoever curses his father or his mother is to be put to death."
>
> Now curses, it's a interpret the greek word for curses. in the amplified version it goes beyond curses and it says abuses or treats improperly. And, uh, in Exodus 21:15, anyone who hits his mother or father should be put to death. So all of those things, hit, harm, abuses, mistreats, shall be put to death. And uh, there's no where in the New Testament where it eradicates the law. The Lord came to fulfill the law, not to change it or abolish it.
>
> If you go all the way back, if you go all the way back to, uh, the in. fifth commandment, it's the

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> first commandment that has a promise to it. And that is that you honor your mother and father. You respect them, in order that your days may be long upon this earth. And if you violate that, you subject yourself to the possibility of not living as long as you might have lived.
>
> And I submit to you that the penalty should fit the crime. According to whether you curse your father, hit your father, abuse your mother, mistreat her, or shoot her in the chest from four feet away.
>
> Leviticus 20 verse 9, the Lord gave the following regulation: "Anyone who curses his father or his mother shall be put to death." He is responsible for his own death. He killed his parents, I submit to you. You're not pulling the switch. You're just carrying out your duty. You took an oath to abide by that duty. Life for life, bone for bone, eye for eye.
>
> And, uh, we just submit to you folks that there is a Biblical basis for all of our laws. It's there. You can trace it back. . . . you may want to pray about that and be sure you're doing the right thing and ask for some guidance.
>
> Because you don't totally ignore what's in this book just because we're asking you to be the judge of the law and the facts because you take that common sense with you back there.

Resp. Ex. 2R at 2800-02.

Relying on *Donnelly*, 416 U.S. at 637, and *Darden*, 477 U.S. at 168, petitioner contends that the prosecutor's inflammatory reference to the Last Supper picture and his exhortation to the jury based on biblical passages so

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infected the trial with unfairness as to create a due process violation. In *Darden*, the Supreme Court recognized that "it is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Darden*, 477 U.S. at 180-81 (quoting court of appeals). Instead, the "relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* at 181. The Court cautioned that "the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.' " *id.* In *Darden*, the prosecutor made several improper comments, including referring to a defendant as an animal that should not be out of his cell except on a leash and wishing that the victim's husband had blown the defendant's face off. *Id.* at 180 n.11 & 12.

With respect to the Last Supper reference, the court finds the argument similar to the one made by the prosecutor in the closing argument of the guilt/innocence phase of petitioner's original trial. Not only did the reference to the painting point to the murder scene, but the evidence showed that defendant did rebel against his strict Christian upbringing, furnishing a motive for the shootings. *See e.g.* Resp. Ex. 2Q at 2671 Testimony of Larry Romine. Because the prosecutor's argument in this respect did not manipulate or misstate the evidence, *see Darden*, 477 U.S. at 181-82, the court rules that the reference to the Last Supper and petitioner's Christian upbringing did not violate petitioner's due process rights.

Regarding the prosecutor's exhortation from the Bible, however, the court finds those comments clearly

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improper but do not rise to the level of a due process violation. *See Darden*, 477 U.S. at 180 (finding prosecutor's comments improper but not unconstitutional). Petitioner has not pointed to any Supreme Court cases nor has this court found any, which condemn this sort of argument as a violation of a defendant's due process rights. Under the AEDPA, this court can only grant relief if the state court decision contravenes clearly established federal law as set forth by the Supreme Court. 28 U.S.C. § 2254(d)(1).

Instead, petitioner cites several cases in which lower courts have condemned the use of religious symbols by prosecutors in closing arguments. *See e.g. United States v. Giry*, 818 F.2d at 120; *Commonwealth v. Chambers*, 559 A.2d 630 (Pa. 1992). While these cases would have been persuasive to the Georgia Supreme Court on direct review, they do not focus on whether the comments rendered the trial fundamentally unfair on collateral review.

In addition, the cases cited by petitioner in which a federal court considered on collateral review whether a prosecutor's religious comments during closing argument amounted to a due process violation do not stand for the proposition that such comments render a trial fundamentally unfair. In *Cunningham v. Zant*, 928 F.2d at 1020, the Eleventh Circuit condemned the prosecutor's numerous appeals to religious symbols and beliefs as improper but declined to determine whether those comments warranted a new sentencing hearing because the court had already found that improper jury instructions during the penalty phase required vacating the death sentence. In *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989), the district court found that allowing the jury to take a Bible

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into the jury room at the beginning of deliberations was constitutional error. The court reasoned that the Bible as an extra-judicial code of conduct that did not necessarily accord with the jury's instructions had a great potential to influence the jury's deliberations. *Id.* at 1559.

Instead, the court finds *Cobb v. Wainwright*, 609 F.2d 754 (5th Cir. 1980) to be instructive. In *Cobb*, the Fifth Circuit applied *Donnelly* to a case in which the prosecutor had made several inflammatory comments during closing argument, including telling the jury that under the Bible's teachings there was no reason to show the defendants mercy. Considering the strength of the evidence against the defendant and noting that the prosecutor had not attempted to mislead the jury with allusions to non-existent evidence and that defense counsel followed the prosecutor's argument, the court held that "no prejudice amounting to such a denial of constitutional due process was shown." *Id.* at 755.

Similarly, the prosecutor in petitioner's case did not mislead the jury with allusions to nonexistent evidence and defense counsel followed the prosecutor's argument, alleviating any prejudice that resulted from the resort to biblical passages. Furthermore, a review of the record shows that the prosecutor informed the jury at the beginning of his argument that what he said was not considered evidence. Resp. Ex. 2T at 2750. In addition, the court instructed the jury at the beginning of the resentencing trial and after closing arguments that closing arguments are not evidence and the jury was only to consider the evidence presented in making its decision. Resp. Ex. 2L at 1249; Resp. Ex. 2R at 2687-88.

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Petitioner further contends that these arguments violated the Eighth Amendment by encouraging arbitrariness in the imposition of the death penalty, *see Furman v. Georgia*, 408 U.S. 238 (1972), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and by reducing the jury's role in the sentencing process in violation of *Caldwell v. Mississippi*, 472 U.S. at 320. The court finds both claims to be without merit. First, the prosecutor's argument did not have the effect of making the jury's discretion wholly arbitrary and without objective standards. The jury was still bound by the trial court's instructions on the law setting out the factors that they were to consider. Second, the court finds that none of the comments had the effect of misleading the jury as to its role and may have increased the jury's perception of that role. *See Darden*, 477 U.S. at 182 n.15 (finding no *Caldwell* violation based on prosecutor's inflammatory remarks).

IX. Remaining Claims

In the remainder of his brief, petitioner incorporates all those claims which he had asserted in his amended petition for writ of habeas corpus but did not specifically brief. Petitioner asserts that the seventy-five page limit imposed by the court made it impossible to address every claim in the amended petition. However, in the scheduling conference on May 1, 1998, petitioner requested that the court grant a page extension of seventy-five to one hundred pages in order to sufficiently brief petitioner's claims. The court then granted petitioner's request for an extension of the page limitation to seventy-five pages. Moreover, a review of respondent's brief in support of his answer-response shows that respondent was able to

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address most of petitioner's claims within the page limitation imposed by the court. Accordingly, the court finds that all claims not specifically briefed by petitioner have been defaulted and denies all such claims on this ground.

Despite this default, however, the court considered the viability of each of these claims and sets forth these additional reasons for denying the claims. First, the court finds that the following claims are procedurally barred under O.C.G.A. §9-14-48(d) for failure to timely raise the objection at the resentencing trial and then on appeal and thus are procedurally defaulted: Claim XI, Claim XIV, Claim XV ¶¶ 287-94, Claim XVI with regard to the resentencing trial, Claim XX, and Claim XXII ¶¶ 191-210 with the exception of the challenges to the prosecutor's closing argument at the resentencing trial, which the court has addressed in Part IX, *supra*. Petitioner has failed to establish cause and prejudice for the procedural defaults.[23]

Second, after careful consideration and review of the record and the applicable law, the court finds the following remaining claims to be without merit: Claim II §§ 2-6, Claim III § 2, Claim V ¶¶ 171-88, Claim XII, Claim XIII, Claim XVI as to the original trial, Claim XVII, Claim XVIII, Claim XIX, and Claim XXI.

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[23] Petitioner asserts that ineffective assistance of counsel is the cause of the defaults. The court has considered the ineffective assistance of counsel claims and has found them to be procedurally defaulted or without merit. See Part IV, Part IX, and Order of May 29, 1997.

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CONCLUSION

This amended petition for writ of habeas corpus [7-1] is hereby DENIED.

IT IS SO ORDERED this 25th day of March, 1999.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

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ROMINE

v.

The STATE.

No. 43207.

Supreme Court of Georgia.

Dec. 2, 1986.

Reconsideration Denied
Dec. 17, 1986.

J. Roger Thompson, Elijay, Thomas P. Lenzer, Norcross, for Larry Romine.

Roger G. Queer, Dist. Atty., Jasper, Michael J. Bowers, Atty. Gen., Paula K. Smith, Asst. Atty. Gen., for the State.

CLARKE, Presiding Justice

This is the second appearance of this death penalty case. Previously, this court affirmed appellant's conviction on two counts of murder, but reversed the death sentences on the ground that appellant's presentation of potentially mitigating evidence was improperly restricted. See *Romine v. State*, 251 Ga. 208, 305 S.E.2d 93 (1983). The facts are set forth in our previous opinion. Stated briefly, appellant Larry Romine, a former gospel singer and occasional preacher whose descent into a life of drugs and adultery met with severe parental disapproval and opposition, entered his parents' home one day

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while they were at work, waited for their return, and then killed them both with a .16 gauge shotgun.

After a retrial on the question of sentence, Romine has again been sentenced to death. We now affirm.[1]

1. In his first two enumerations of error, Romine argues that the trial court erred by directing the jury to continue its deliberations after the jury had communicated to the court "in clear and unambiguous language" that it was "hopelessly deadlocked," and further erred by subsequently giving the jury a so-called "Allen" charge. See *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

For reasons which follow, we conclude that the trial court did not abuse its discretion by directing further deliberations, and that, inasmuch as the charge subsequently given by the court contained none of the aspects

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[1] The jury returned its verdict as to sentence on August 29, 1985. The completed trial transcript was filed in the superior court on December 16, 1985, and the case was docketed in this court on January 2, 1986. However, when it was learned that appellant's trial attorney had suffered a heart attack shortly after the completion of the trial the case was stricken from the docket of this court and remanded to the trial court for a determination of whether new or additional counsel should be appointed to represent appellant on appeal. After a hearing, the trial court ruled on February 12, 1986, that the trial attorney, J. Roger Thompson, had continued to work on the appeal since the remand, and that he was physically capable of proceeding, particularly if additional counsel was appointed to assume a share of the workload. Attorney Thomas Lenzer was appointed to assist Thompson with appellant's representation, and the case was re-docketed in this court on February 18, 1986. The case was orally argued on April 22, 1986.

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for which *Allen* charges have been so often – and justifiably – criticized, it was not improper.

(a) We begin our analysis with an exposition of the relevant historical facts of the trial proceeding. The presentation of evidence began (after a lengthy voir dire session) on August 21, 1985. Closing arguments and the charge of the court concluded seven days later and the jury began its deliberations at 2:50 p.m. on August 28.

At 6:15 p.m., the court asked the jury if it was making any progress in its deliberations and if it would like to break for dinner at that time. The foreman answered, "We have a pretty wide division on it right now and the consensus of most everybody here is – " The court interrupted to ask the foreman not to tell "about your division of it," and the foreman continued, "I'm not. It's that they don't believe they can make a decision on it, about it."

The court sent the jury to dinner, with instructions to return at 7:30 p.m., stating, "That'll give you an hour and fifteen minutes. Then I'll let you all deliberate a while longer tonight. If you're not able to reach a verdict, then I'll, we'll talk about it later."

Shortly after 10:00 p.m., the court asked the jury if it had been able to make any progress since supper. The foreman answered, "Some." The court asked whether the jury would like to continue their deliberations that evening, or to come back in the morning. The foreman answered, "I don't think staying here any longer tonight will change anyone's mind one way or the other." The trial court then recessed for the evening.

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Deliberations resumed at 9:00 a.m. the next day. At 9:15, the court received a note from the foreman stating, "We are unable to reach a unanimous decision and are certain we will not ever be able to reach one."

At 10:00 a.m., the court discussed the note with the jury, in open court, as follows:

"The Court: Mr. Foreman, I have a note here that you had sent concerning your deliberations so far. Without telling me which way and what it is, can you just give me the numerical breakdown of how you stand? That's the only thing, just a numerical breakdown.

"The Foreman: Eleven to one.

"The Court. Eleven to one?

"The Foreman. Yes, sir.

"The Court: Oh, foreman, you all have only been deliberating about six and a half, seven hours and I would like you all to consider continuing your deliberations. See what you can do with it. I'm not putting any pressure on you one way or the other. Whatever your decision is, that's your decision, but I feel like you need to deliberate on it longer

"The Foreman: Well, the six or seven hours is what we've been together. But everybody has thought about it in their own mind for, since 3:00 yesterday. I believe some people thought about it in their own minds very seriously last night.

"The Court: Well, still, uh . . . I'm gonna leave you together for a while longer and see what you can do, sir."

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Appellant made a motion for a mistrial, on the ground that the jury was deadlocked. The motion was denied.

At 11:00 a.m., the jury asked the court to give a recharge on mitigating circumstances, and that was done.

At 3:30 p.m., after determining that the jury had not yet reached a verdict, the court gave the following instructions to the jury:

"Let me give you some other instructions at this time. You have now been deliberating upon this case for a considerable period of time. The court deems it proper to advise you further in regards to the desirability of agreement if possible.

"The case has been exhaustively and carefully tried by both sides and has been submitted to you for decision and verdict if possible.

"While the verdict must be the conclusion of each juror and not a mere acquiescence of the jurors in order to reach an agreement, it is still necessary for all of the jurors to examine the issues and questions submitted to them with candor and fairness and with proper regard and deference to the opinions of each other. A proper regard for the judgments of others will greatly aid us in forming our own judgments.

"Each juror should listen to the arguments of other jurors. If the members of the jury differ in their views of the evidence or the mitigating or aggravating circumstances, such differences of opinion should cause them all to scrutinize the evidence more closely and to re-examine the grounds of their opinion. It's your duty to decide the

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issues which have been submitted to you if you can conscientiously do so.

"Do not hesitate to change an opinion if convinced it is wrong. However, you should never surrender honest conviction or opinions in order to be congenial or to reach a verdict solely because of the opinions of other jurors.

"The aim ever to be kept in view is the truth as it appears from the evidence, examined in the light of the instructions of the court. Now upon our exit, you may again continue your deliberations for a reasonable period of time and examine your differences in a spirit of fairness and candor and try to arrive at a verdict in this case.

"I believe you've been going since lunch, haven't you? Since you came back from lunch?

"Why don't at this time we let you walk about, get you a Coke or a drink of water, use the restrooms and then come back in and let you start from the very beginning and see if there's any possibility of a verdict."

Appellant's objection to the charge was overruled, and his motion for mistrial was denied.

At 5:30 p.m., the jury informed the court that it had reached a verdict. The parties were assembled and the jury's verdict of death on both counts of murder was published at 6:00 p.m.

(b) Romine refers us to three death penalty cases from the states of Florida and Delaware involving deadlocked juries and *Allen* charges. See *Patten v. State*, 467 So.2d 975 (Fla.1985); *Rush v. State*, 491 A.2d 439

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(Del.Supr.1985); and *Rose v. State*, 425 So.2d 521 (Fla.1982).

Delaware law makes no provision for a verdict of life; the jury is simply asked whether it unanimously recommends a death sentence. In *Rush v. State*, supra, the jury told the trial court that it was unable to reach a unanimous verdict and wished to know what to do about the verdict form. The Delaware Supreme Court held that the trial judge should have limited his response to the second paragraph of his supplemental instructions, viz: "Unlike an ordinary verdict where there must be unanimous agreement by all twelve jurors one way or the other, that is, guilty or not guilty, question 2 simply asks, 'Does the jury unanimously recommend that a sentence of death be imposed?' If there is not unanimous agreement to recommend a sentence of death, the answer to that question must be 'no.' "

Under Delaware law, when a jury decides that it cannot agree on a unanimous verdict of death, it has reached a verdict, and the trial court must accept it. Any instructions to deliberate further in an attempt to reach a unanimous verdict implicitly encourage the jury to reach a verdict of death, in view of the form of the verdict presented to a Delaware jury.

Romine points out that, in Georgia, where the sentencing jury is unable to agree on whether to recommend death or to recommend mercy, the trial court must sentence the defendant to imprisonment as provided by law. *Miller v. State*, 237 Ga. 557, 229 S.E.2d 376 (1976). He reasons that Georgia law is like Delaware law in that if the jury is unable to agree unanimously on death, the

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defendant is sentenced to life, and that we should follow the lead of the Delaware Supreme Court and hold that where the jury communicates to the court that it cannot agree on the sentence to be imposed, the trial court *must* accept this communication as a verdict and impose a life sentence.

Of course, the general rule in this state is that "a motion for mistrial based on the length of the jury's deliberation is within the sound discretion of the trial court. [cits.]" *Cofield v. State*, 247 Ga. 98, 113, 274 S.E.2d 530 (1981). Moreover, the trial court "is not bound to accept the jury's feeling that it is hopelessly deadlocked." *Todd v. State*, 243 Ga. 539, 542, 255 S.E.2d 5 (1979). Romine argues that the general rule is inapplicable to sentencing proceedings, because under the rule of *Miller* the jury has three possible choices in the sentencing phase; i.e., the jury may (1) unanimously agree to recommend death; or (2) unanimously agree to recommend mercy; or (3) unanimously agree that it will not be able to recommend death or life. Here, Romine argues, the jury selected option (3), and the trial court should have accepted it.

However, pretermitting whether the foreman's view that the jury was hopelessly deadlocked was shared by all of the other jurors, it does not follow that, because the consequences of a hung jury on the question of sentence differ from the consequences of a hung jury on the question of guilt, the decision of whether the jury is truly deadlocked must be taken from the sound discretion of the trial judge and given to the jury.

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In contrast to the policy codified in Delaware law, under Georgia law a jury is expected to review the evidence and to endeavor to reach unanimity "one way or the other" on the question of sentence, and, if possible, to affirmatively and unanimously recommend either death or mercy. OCGA §§ 17-10-2(c) and 17-10-30(c); *Davis v. State*, 255 Ga. 598(25), 340 S.E.2d 869 (1986); *Parks v. State*, 254 Ga. 403(14), 330 S.E.2d 686; *Alderman v. State*, 254 Ga. 206(10)(32), 327 S.E.2d 168 (1985); *Ingram v. State*, 253 Ga. 622(15), 323 S.E.2d 801 (1984); *Allen v. State*, 253 Ga. 390(2), 321 S.E.2d 710 (1984); *Legare v. State*, 250 Ga. 875, 876, 302 S.E.2d 351 (1985). Because either verdict must be unanimous, and because the jury is not informed of the consequences of its inability to reach a verdict as to sentence, instructions to deliberate further simply do not have the effect of suggesting to a Georgia jury that it should return a death sentence.

The Florida cases relied upon by Romine are in our view even less pertinent than the *Rush* case. Not only is a unanimous agreement unnecessary to a Florida sentencing verdict – a bare majority is all that is required – but whatever the jury's recommendation, it can be overridden by the trial judge. In Georgia, of course, the verdict, as noted above, must be unanimous, and it is binding. *Spivey v. State*, 253 Ga. 187(5), 319 S.E.2d 420 (1984).

Consistent with our previous cases, we hold as follows: (1) Where a jury is unable to agree on a verdict, that disagreement is not itself a verdict; and (2) whether a jury is hopelessly deadlocked is an evaluation we commit to the sound discretion of the trial court, subject to appellate review for an abuse of discretion.

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(c) In this case, presentation of the evidence, the arguments and the charge took the better part of seven days. After less than four hours of deliberation, the foreman reported a "wide division" and expressed doubt about the possibility of a verdict. After three additional hours of deliberation the foreman expressed further, and more positive, doubt about the jury's ability to reach a verdict. Meanwhile, however, the jury had made considerable progress, and the division had narrowed significantly.

Considering the length and complexity of the trial, the length of time the jury deliberated before declaring itself deadlocked, and the amount of progress made in the interim, we find no abuse of discretion in the court's refusal to declare a mistrial. See *Thornton v. State*, 145 Ga.App. 793, 245 S.E.2d 22 (1978).

(d) Romine next argues that "the *Allen* charge is an incorrect statement of the law and is impermissibly coercive when given in the sentencing phase of a death penalty trial." The *Allen* charge, he urges, is "inherently coercive," and for that reason has been prohibited in some states, and approved only in modified form in others. But, he argues, no matter how the charge is phrased, it is error to give it at the sentencing phase of a death penalty trial.

It has been noted that "it is somewhat imprecise to refer to a single *Allen* charge. Decades of judicial interpretation have produced a variety of permutations and amplifications of the original wording, some remarkably elaborate. [Cits.]" *People v. Cainer*, 19 Cal.3d 835, 139 Cal.Rptr. 861, 566 P.2d 997, 97 A.L.R.3d 73, 81 (1977)

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The charge originally approved in the *Allen* case was summarized by the United States Supreme Court as being, "in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority" *Allen v. United States*, supra, 164 U.S. at 501, 17 S.Ct. at 157.

One of the more common additions to this kind of charge is an observation that "the case must at some time be decided," or that the jury has been "selected in the same manner and from the same source from which any future jury must be selected, and there is no reason to suppose the case will ever be submitted to twelve men or women more intelligent, more impartial or more competent to decide it." *People v. Carney*, supra. See also, *Legare v. State*, supra, 250 Ga. at 576, 302 S.E.2d 351.

This language, as well as the element approved in the original charge that admonishes jurors in the minority to

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rethink their position in light of the majority's views, have drawn the most criticism – the admonition to the minority jurors on the ground that it is coercive, and the observation that the case has to be decided by some jury on the ground that it is inaccurate. *Legare v. State*, supra; *People v. Gainer*, supra. Compare *Norley v. State*, 170 Ga.App. 249(3), 316 S.E.2d 808 (1984) and cits.

However, unless the trial judge must declare a mistrial as soon as the jury reports difficulty reaching a verdict – and we have just held to the contrary – then some supplemental instructions concerning further deliberations are desirable, perhaps even necessary. In the commentary to Rule 15-4.1(b) of the ABA Standards for Criminal Justice it is stated: "[T]he *Allen* charge should not be used. It is appropriate, however, for a court to give or repeat to the jury an instruction on its responsibilities in the course of deliberations, as provided in Standard 15-4.4(b). This may be done when the jury has indicated its inability to reach an agreement or has deliberated for some time without reaching an agreement." Id at p. 15.143.

Standard 15-4.4(b) "does not require the use of any particular language, but does identify the five points on which a jury might properly be advised." ABA Standards at p. 15.134. These five points are:

"(i) that in order to return a verdict, each juror must agree thereto;

"(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.

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"(iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

"(iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

"(v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict." Id. at p. 15.133.

The supplemental instructions given in this case are consistent with the ABA standard, and did not single out jurors in the minority as being the only ones who might reasonably be asked to re-examine their views, or erroneously imply that a mistrial would result in a retrial. Compare *Legare v. State*, supra; and *People v. Gainer*, supra.

The supplemental instructions given here were fair and accurate. The trial court did not abuse its discretion by giving them.

2. In his third enumeration, Romine argues that the trial court erred by charging, "whatever your verdict is as to penalty, it must be unanimous . . . " This enumeration is answered by the preceding division of this opinion.

3. In his next two enumerations of error, Romine complains of two portions of the court's charge which, Romine argues, had the impermissible effect of limiting the jury's consideration of mitigating circumstances.

In the first instance, the court instructed the jury that evidence of prior difficulties between the defendant and

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his parents was introduced for the limited purpose of illustrating "the state of feeling between the defendant and the alleged victims, and the bent of mind and course of conduct on the part of the accused." Later, the court told the jury: "[Y]ou are authorized to consider all of the evidence introduced here in court in this sentencing trial, presented by the state and the defendant, unless the court has previously instructed you to consider certain evidence introduced by the state or the defendant for a limited purpose only, in which event such evidence shall not be considered by you in determining punishment."

In the second instance, the court charged that "voluntary intoxication shall not be an excuse for any criminal act . . . [One who voluntarily intoxicates himself] is criminally responsible for such acts to the same extent as if he were sober." The court also charged that episodic amnesia is not a defense to a crime.

Romine argues that these charges were improper because they implied that his intoxication at the time of the crime, his memory lapses, and his prior difficulties with his parents could not be considered in mitigation. However, while the charge in this respect perhaps is not the perfect model on which future charges should be patterned, we find that the charge, considered as a whole, did not limit the jury's consideration of mitigating circumstances.

As we have noted previously, evidence relating to guilt or innocence is relevant to sentence. See *Cook v. State*, 255 Ga. 385, 386 (n. 11), 340 S.E.2d 843 (1986); *Alderman v. State*, 254 Ga. 206, 210(6), 327 S.E.2d 168 (1985); *Blankenship v. State*, 251 Ga. 621, 308 S.E.2d 369

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(1983). It may have particular importance where, as here, the case is being retried as to sentence and the jury is hearing for the first time, at the sentencing phase of the trial, evidence relating to the circumstances of the offense. In this case, moreover, the statutory aggravating circumstances contended by the state *were* some of the circumstances of the offense, and thus, notwithstanding Romine's conviction on two counts of murder and one count of armed robbery, the state was required to prove beyond a reasonable doubt that one count of murder was committed while the defendant was engaged in the commission of the other murder, and that the other count of murder was committed while the offender was engaged in the commission of the offense of armed robbery. OCGA § 17-10-30(b)(2) and (c).

Romine vigorously denied the commission of these offenses. He claimed that he was drugged by his girlfriend to the point that he was only vaguely aware of his activities during the period of time in which these crimes occurred; that his girlfriend was the real killer; and that his pre-trial confession was the product of a drug-induced hallucination and a desire to protect his girlfriend.

Because this was a retrial as to sentence in which the defendant disputed his guilt, the court was required to include in its instructions matters that ordinarily would have been covered in the charge at the guilt-innocence phase of the trial, including credibility of witnesses, expert testimony, definitions of the crimes charged, and theories of criminal liability.

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At Romine's request, the court charged on involuntary intoxication as a defense to criminal liability. The state contended that Romine was voluntarily intoxicated and so the court charged that voluntary intoxication, unlike involuntary intoxication, was not a defense to criminal liability. In view of the court's subsequent instructions informing the jury that mitigating circumstances are "those which do not constitute a justification or excuse for the offenses in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame," and further specifically informing the jury that it could consider the defendant's use of drugs and alcohol in mitigation, we find no error in the court's charge on voluntary intoxication.

As for the charge that certain evidence was admitted for a limited purpose having no relevance to punishment, and not to be considered in that regard, the state – despite having requested the charge – has not explained its necessity (or its meaning), and we are unable to perceive it. Presumably, evidence properly admitted at the punishment phase of a trial is relevant, somehow, to the question of punishment, even if only in a limited way.

Nonetheless, however the jury may have construed this portion of the charge (if they noticed it at all, given its brevity), the jury could not reasonably have concluded from the charge as a whole that the defendant's prior difficulties with his parents could not be considered in mitigation. In addition to the portions of the charge quoted previously, the court's charge on mitigating circumstances included the following:

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"I charge you that a jury must be allowed to consider on the basis of all relative [sic] evidence, not only why a death sentence should be imposed, but also why it should not be imposed. The jury should consider as a mitigating factor any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death.

"Now ladies and gentlemen of the jury, I charge you that life imprisonment may be imposed even though statutory aggravating circumstances are found to exist. Under no circumstances conceivable to you, the jury, do you have to render a death penalty recommendation.

"You may set the penalty to be imposed at life based upon any mitigating or extenuating facts and circumstances that you find to exist or you may recommend a life sentence for any reason satisfactory to you or for no reason, whether or not you find the existence of mitigating circumstances from the evidence presented to you in this case.

"You may fix the penalty at life imprisonment if you see fit to do so for any reason satisfactory to you, with or without reason.

"I charge you that the jury is empowered to consider as mitigating anything they find to be mitigating without limitation or definition. I further charge you that the jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the Court."

The court's instructions on mitigating circumstances – which are even more extensive than we set forth above,

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and which, at the jury's request, were repeated in full midway through the jury's deliberations – are sufficiently clear, comprehensive and complete to dispel any reasonable possibility that the jury felt at all restricted in its consideration of mitigating circumstances. Compare *Finney v. State*, 253 Ga. 346(6), 320 S.E.2d 147 (1984).

4. In his sixth enumeration of error, Romine complains of the court's refusal to charge that the testimony of a witness testifying under a grant of immunity or promise of leniency, although competent, should be examined with great care. In view of the lack of evidence to support the charge, we conclude that the error, if any, in the court's refusal to give it is harmless beyond a reasonable doubt. Compare *Owens v. State*, 251 Ga. 313(1), 305 S.E.2d 102 (1983); *Fleming v. State*, 236 Ga. 434, 438, 224 S.E.2d 15 (1976).

5. The court did not err by referring in its charge to a jury "recommendation" as to sentence, inasmuch as the charge clearly conveyed to the jury that its recommendation would be binding.

6. Romine requested the court to charge that the jury "should consider with great care and caution the evidence of any statement made by the defendant." Contrary to his 8th enumeration of error, the trial court did not err by charging the jury as requested.

7. The trial court did not err by denying Romine's request for a change of venue. *Dewar v. State*, 253 Ga. 604(4), 323 S.E.2d 150 (1984).

8. In his 10th enumeration of error, Romine contends the trial court erred by denying his motion to strike

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prospective juror Dobson for cause. Romine argues that she had two problems: "(1) [H]er lack of adequate supervision of small children in the home during her long sequestration would substantially impair her ability to concentrate on the evidence at trial; and (2) she had formed an opinion as to the appropriate punishment . . . "

When asked by the state whether she had formed an opinion as to punishment, juror Dobson answered, "That's really hard for me to answer. I'd say at times, yes, I have." Later, the defendant's attorney asked her if she was leaning one way or the other, and she answered that she would "have to hear the facts." She was afraid she might not be able to be fair, but she would do her best. The court questioned her about her ability to be fair and attentive. She told the court that she could make up her mind based on what she heard during the trial, and that she could make arrangements for her children.

Defendant moved to strike the juror. (Challenges were taken up outside the presence of the prospective jurors during this sequestered voir dire proceeding.) The state responded that although the juror had expressed some opinion, it was not so fixed that it could not yield to the evidence and the charge, and that her problems with her children could be handled satisfactorily.

The court denied the challenge, stating: "She said she'll do [her best] and that she'll listen to the evidence and base her opinion . . . on the evidence in this case and the charge of the court . . . [S]he was very alert and giving her attention to everything that was said and I think this juror, based on what I've seen of her here, she would be a

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very fair juror and she would give every bit of the attention she could to the case."

We find no error. *Waters v. State*, 248 Ga. 355(2), 283 S.E.2d 238 (1981).

9. Prospective juror Andrews was asked on defense voir dire, "What does the term 'life sentence' mean to you?" She answered, "Well, to me it means that you have so many years to serve – I don't know much about law. Is it true that you serve like seven, eight, nine years that you can be released?"

The court responded briefly that there would be two alternatives, death or life in prison, and the defense voir dire continued on other matters. After it concluded, the state was given permission to ask further questions, and it re-opened the inquiry into the juror's understanding of a life sentence, asking, "Would you finish your answer?" She stated, "Well what I mean is, they give somebody life and then in so many years they're out again. Is that not true in some cases?"

At this point the court questioned the juror, as follows.

"The Court. M'am, let me state this. we can't get into those and I don't know how to answer you. I think you've answered the other questions.

"But you're willing to look at the evidence in the case and treat this case and leave it up to whoever it might be somewhere else to determine whether a man should be released or not?

"A That's right.

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"The Court: In other words, you're going to make your decision based on the evidence in this case and what I charge you should be done?

"A Yes, sir. I'd have to hear the evidence first.

"The Court: And what somebody else might do down the road, you're not going to try to prejudge what they should do?

"A No.

"The Court: Or anyone else?

"A No

"The Court: You're going to be fair and honest with reference to this case right here?

"A That's right."

In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) the United States Supreme Court held that a death sentence was invalid where a jury imposed it after a prosecutor argued to the jury that, if its sentence determination was unfair, it could be corrected by an appellate court. Such an argument, the Court reasoned, was misleading as to the nature of appellate review, and might impermissibly tempt the jury to delegate its sentencing responsibility to the appellate court.

Romine argues that the trial court's colloquy with prospective juror Andrews violated the principles of *Caldwell v. Mississippi*, supra. We need not fully examine this contention, however. The trial court's response (to a matter injected into the voir dire, in the first instance, by the defendant) was repeated to no other juror, and although

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the defendant did object to the response, he did not challenge the juror for cause, and she did not serve on the jury that tried the case. Thus, Romine cannot complain that any member of the jury was inappropriately instructed, nor can he complain that this prospective juror was not stricken for cause.

We find no harmful error

10. In his closing argument, the assistant district attorney asked the jury: " . . . He'd been to the hospital and then he came back rehabilitated, right?

"And you've heard a lot about rehabilitation. How many times has this man been rehabilitated? He gets rehabilitated when it comes right down to the wire. When you're in jail, you get rehabilitated. When you go to a hospital for six months, he spent six months for drug abuse, you get rehabilitated.

"Quite frankly ladies and gentlemen, if he were released from jail, do you think that he would be rehabilitated? Would he go back to drugs like he has before? Would he be able to avoid the temptation like he's admitted to you?"

Romine contends this argument violated OCGA § 17-8-76, which provides, in parts (a) and (b), as follows:

"(a) No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury because pardon, parole, or clemency of any nature may be granted by the Governor, the State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency.

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"(b) If counsel for either side in a criminal case argues to or in the presence of the jury as provided in subsection (a) of this Code section, opposing counsel shall have the right immediately to request the court to declare a mistrial, in which case it shall be mandatory upon the court to declare a mistrial. Failure to declare a mistrial shall constitute reversible error."

A mistrial is mandatory only if the argument contravenes the statute. Since the assistant district attorney did not specifically refer to pardon, parole, or other clemency, the statute was not contravened, and the trial court was not required to declare a mistrial. *Finney v. State*, supra, 253 Ga. at 348-49, 320 S.E.2d 147; *Gilreath v. State*, 247 Ga. 814(15), 279 S.E.2d 650 (1981). The court views the prosecutor's argument with disfavor, but we hold that it does not sink to the level of reversible error.

The trial court did not abuse its discretion by denying the motion for mistrial (which was not made until after the conclusion of the arguments) and no other remedies (e.g., curative instructions) were requested. See *Horton v. State*, 249 Ga. 871(7) 295 S.E.2d 281 (1982).

11. On appeal, Romine for the first time complains of additional portions of the prosecutor's closing argument. Having examined the state's argument in its entirety, we conclude that nowhere did the prosecutor seriously overstep his bounds. We find no reversible error. See *Davis v. State*, 255 Ga. 598(16), 340 S.E.2d 869; *Cook v. State*, 255 Ga. 665(22C), 340 S.E.2d 843 (1986); *Ford v. State*, 255 Ga. 81(6), 335 S.E.2d 567 (1985); *Walker v. State*, 254 Ga. 149(16), 327 S.E.2d 475 (1985); *Spivey v. State*, supra, 253 Ga. 167(4), 319 S.E.2d 420.

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SENTENCE REVIEW

12. The jury found that, as to Count 1, the "murder of Avilee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the armed robbery of Avilee Romine." As to Count 2, the jury found that the "murder of Roy Lee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the murder of Avilee Romine." See OCGA § 17-10-30(b)(2).

These findings are supported by the evidence. OCGA § 17-10-35(c)(2). Compare *Romine v. State*, supra, 251 Ga. 208(8), 305 S.E.2d 93.

13. The death sentences were not imposed in this case under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35(c)(1).

14. The sentences imposed in this case are neither excessive nor disproportionate, considering both the crime and the defendant. OCGA § 17-10-35(c)(3).

Judgment affirmed.

All the Justices concur.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12449-P

Larry ROMINE,

Petitioner-Appellant,

versus

FREDERICK J. HEAD, Warden,
Georgia Diagnostic and
Classification Prison,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Aug. 16, 2001)

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 15, 2001, 11th Cir., 2001, ___ F.3d ___).

Before: CARNES, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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Procedure, Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

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IN THE SUPREME COURT OF GEORGIA

LARRY ROMINE

APPELLANT

VS. DOCKET NO. 43207

STATE OF GEORGIA

APPELLEE

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF GEORGIA

LARRY ROMINE
APPELLANT

V. DOCKET NO. 43207

STATE OF GEORGIA
APPELLEE

ENUMERATIONS OF ERROR

Comes now LARRY ROMINE, Appellant herein named, and herewith enumerates as errors in the trial of his case, the following:

1.

The court erred by not granting Appellant's motion for mistrial after the foreman of the jury sent a written note to the court stating that the jury was hopelessly deadlocked and would never be able to reach a unanimous decision.

2.

The court erred in giving the Allen charge to the jury because the Allen charge is an incorrect statement of the law and is impermissibility coercive when given in the sentencing phase of a death penalty trial.

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3.

In the sentencing phase of a death penalty trial, the court erred in charging the jury that their verdict must be unanimous.

4.

The court's charge to the jury precluded the jury from considering relevant mitigating evidence by instructing them that evidence of the prior difficulties between Appellant and his parents could not be considered in determining what sentence to impose, in violation of the Eighth and Fourteenth Amendments, Article 1, Section 1, Paragraphs 1 and 17 of the Constitution of the State of Georgia (1983) and O.C.G.A. 17-10-30.

5.

The court's charges on voluntary intoxication and amnesia were irrelevant and confusing, and precluded the jury from considering these factors as mitigating evidence in violation of the Eighth and Fourteenth Amendments, Article 1, Section 1, Paragraphs 1 and 17 of the Constitution of the State of Georgia (1983), and O.C.G.A. 17-10-30.

6.

The court erred in refusing to give defendant's Request to Charge Number 1 as to the effect of testimony by a witness given under grant of immunity in that said Request was raised by the evidence and was an accurate

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statement of the law properly adjusted to the evidence in the case.

7.

The court erred in charging the jury that they could fix the penalty at life imprisonment or in the alternative that they could recommend that the death penalty be imposed.

8.

The court erred in charging the jury that they should consider the evidence of any statement made by Appellant with great care and caution

9.

The court erred in denying Appellant's motion for change of venue

10.

The court erred in not excusing for cause Mrs. Jim Dobson because she was not a fair and impartial juror.

11.

The court erred in indicating to prospective juror Kathryn Andrews that executive clemency in the form of parole might be available to the Appellant.

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12.

The court erred in not granting Appellant's motion for mistrial because of the District Attorney's reference to executive clemency during his closing argument.

13.

The prosecutor's closing argument contained repeated references to irrelevant, arbitrary and prejudicial factors, and contained numerous prejudicial misstatements of the law, which caused Appellant's sentences of death to be imposed under the influence of passion, prejudice and other arbitrary factors and resulted in a sentencing proceeding that was fundamentally unfair.

14.

The sentences of death in the instant case are excessive and disproportionate to the penalty imposed in similar cases, and were imposed under the influence of passion, prejudice, or other arbitrary factors.

Respectfully submitted,

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* * *

12. THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR MISTRIAL BECAUSE OF THE DISTRICT ATTORNEY'S REFERENCE TO EXECUTIVE CLEMENCY DURING HIS CLOSING ARGUMENT.

O.C.G.A. 17-8-76, clearly provides that:

> (a) No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury because pardon, parole, or clemency of any nature may be granted by the Governor, the State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency.
>
> (b) If counsel for either side in a criminal case argues to or in the presence of the jury as provided in subsection (a) of this Code section, opposing counsel shall have the right immediately to request the court to declare a mistrial, in which case it shall be mandatory upon the court to declare a mistrial. Failure to declare a mistrial shall constitute reversible error.

The District Attorney in closing argument made the following statements:

> "Quite frankly ladies and gentlemen, if *he were released from jail*, do you think that he would be rehabilitated? Would he go back to drugs like he had before? Would he be able to avoid the temptation like he's admitted to you." (T.2763) (Emphasis supplied)

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> "And we don't want you to return a penalty just because he's a drug addict. But, uh, he's gonna get back on drugs if he has an opportunity.
>
> Would Ralph Romine want him walking the streets? . . . Society has to be protected too." (T.2795)

The only issue in this case was whether or not the Appellant would receive a death sentence or a sentence of life imprisonment. The District Attorney was advocating for the death sentence and the Appellant was advocating for a life sentence. While the District Attorney did not specifically use the words "pardon, parole, or clemency", the only possible connotation that could be placed on these remarks was that if the jury did not sentence the Appellant to death, but only imposed a life sentence, someone, somehow would have the authority to grant some type of clemency and that the Appellant would "not be required to suffer the full penalty imposed by the court or jury . . . "

The Appellant did move for a mistrial on these statements made by the District Attorney during his closing argument, (T.2850-60) contrary to the situation found in *Finney v. State*, 253 Ga. 346, 348.

In *Tucker v. Zant*, 724 F.2d 882, 889 (1984), the Eleventh Circuit Court of Appeals found that a prosecutor could not discuss his own opinion as to the defendant's prospects for rehabilitation which is analogous to the district attorney's argument in this case. "But, uh, he's gonna get back on drugs if he has the opportunity." (T.2795)

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13. THE PROSECUTOR'S CLOSING ARGUMENT CONTAINED REPEATED REFERENCES TO IRRELEVANT, ARBITRARY AND PREJUDICIAL FACTORS, AND CONTAINED NUMEROUS PREJUDICIAL MISSTATEMENTS OF THE LAW, WHICH CAUSED APPELLANT'S SENTENCES OF DEATH TO BE IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE AND OTHER ARBITRARY FACTORS AND RESULTED IN A SENTENCING PROCEEDING THAT WAS FUNDAMENTALLY UNFAIR.

Georgia law provides that a sentence of death may not be imposed under the influence of "passion, prejudice or any other arbitrary factor." O.C.G.A. Section 17-10-35(c)(1). As detailed below, the prosecutor's references to irrelevant, arbitrary and prejudicial factors, and his misstatements of the law were so frequent and so eggregious [sic] that Appellant's trial was fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. Appellant will first list the offending parts of the argument and will then consider their prejudicial effect.

The prosecutor attempted to dilute the jury's sense of responsibility in the sentencing process by arguing that it is not only society's desire that Appellant should die, but God's will as well:

> "I ask you, ladies and gentlemen, to go out there and render a verdict that . . . complies not only with the law of man, the law of God . . . (T. 2800, 2801, 2802).
>
> "But just realize that you have to answer not only to Ralph Romine and Larry Romine, but you have to answer to society. (T. 2791).

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The prosecutor further attempted to dilute this jury's responsibility by telling them that the jury in the first trial made all the findings necessary to impose the death penalty, that Appellant had already been "convicted" of the aggravating circumstances:

> "And let me point out at this time, the Defendant sits here convicted beyond a reasonable doubt of that aggravating circumstance, the armed robbery of his mother." (T. 2952).

The jury's sense of responsibility for imposing the death penalty cannot be lessened or diminished. *Caldwell v. Mississippi*, ___ U.S. ___, 105 S.Ct. 2633 (1985); *Fleming v. State*, 240 Ga. 142 (1977). By arguing to the jury that their function is to carry out society's will and God's will by "filling in the blanks" based upon the prior jury's finding, the prosecutor placed the ultimate responsibility for the death sentence at the feet of society, God and with the first jury. This was clearly improper argument.

In deciding whether to impose the sentence of death, the prosecutor also urged the jury to go outside the evidence admitted at trial:

> "And you guys that are hunters, you know from your common experience, it's not in the evidence, but you know as that pattern, as the string of shot leave the barrel . . . (T. 2773, 2774).

This argument, which concerned a crucial issue in the case, the size of the murderer, was highly improper. *United States v. Warren*, 550 F.2d 219 (5th Cir., 1977); *Connor v. State*, 251 Ga. 113 (1983). The prejudicial effect of this argument is staggering when one remembers that Appellant attempted to show that Ginger McIntyre fired

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the fatal shots. Ginger McIntyre is approximately one foot shorter that [sic] Appellant.

The prosecutor made so many misstatements of the law that Appellant can cite only the most flagrant and prejudicial:

> "Of course, the first offender conviction of Ginger doesn't count [for impeachment] because she's been released and has no record." (T. 2784).

The law is, of course, that convictions under the First Offender Act do "count" for impeachment purposes. *Gilstrap v. State*, 250 Ga. 814 (1983). This error was not corrected by the court in its charge. The prejudicial effect of this "jury charge" is tremendous because so much of the State's case rested upon Ginger McIntyre's credibility as a witness.

Just as eggregious [sic] is the prosecutor's argument that emotion should play no part in their decision:

> "And I'm going to ask you to avoid listening to any emotion and decide this case strictly on logic, and what you know to be the perfect sentence in this case." (T. 2954, 2795).

It is entirely proper for the jury to consider emotion in making their sentencing determination *Connor v. State*, *supra* (1983); *Legare v. State*, 250 Ga. 875 (1983); *Washington v. Watkins*, 655 F.2d 1346, 1376 n.57 (5th Cir., 1981) (exercise of mercy can never be a wholly rational, calculated, logical process).

The prosecutor also misstated the law on voluntary intoxication (T. 2782, 2783, 2797) and the purpose of the sentencing hearing, telling the jury that if they have a

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reasonable doubt as to Appellant's *guilt*, they should sentence him to life imprisonment. (T. 2791).

The court's charge to the jury indicates that he shared the prosecutor's misconception of the purpose of the sentencing trial. Appellant's *guilt* was not in issue. The only issue was whether he deserved to die. It was highly improper to imply to the jury that they could sentence Appellant to life only if they had a reasonable doubt as to his guilt.

The prosecutor also urged the jury to draw adverse inferences from Appellant's plea of not guilty and the exercise of other constitutional rights. (See e.g., T. 2766, 2781). The prosecutor also comments on Appellant's failure to produce evidence. (T. 2768, 2792). It is improper to comment upon a Defendant's exercise of his constitutional rights. *Griffin v. California*, 380 U.S. 609 (1965).

At several points in his argument, the prosecutor raises the spectre of Appellant's eventual release from prison if he is not electrocuted:

> "But, uh, he's gonna get back on drugs if he has an opportunity.
>
> "Would Ralph Romine want him walking the streets? (T. 2795)

The prosecutor closed with an improper appeal to gut emotion and passion:

> "You know, is this debris on the wall? What is it? It's her lungs and her tissue and her blood and things of that nature . . .
>
> "You heard Ruth Jordan I believe it was describe the look on her face. What terrible

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anguish it was. Could the funeral home do much with it?

> "He splattered his mother's living tissue . . . it sprays it all over that picture of the Last Supper of Christ sitting with the disciples." (T 2797, 2798).

This is the type of passion that this Court so justly condemned in *Conner v. State, supra.*

Considered in its entirety, the prosecutor's closing argument diminished the jury's sense of responsibility and confused the jury as to the issue at trial. By implying that the jury was to "convict" Appellant of some crimes and that he deserved a life sentence only if the jury was convinced he was "innocent", irrelevant considerations were interjected into the proceeding. He urged the jury to go outside the evidence to decide the crucial issue of the size of the murderer. He charged the jury that they could not consider the prior criminal record of a key State's witness. Finally, in an appeal to the passion of the jury, he asked them to consider one victim's organs and tissue splattered on a picture of the Last Supper. Appellant's sentences of death were thus improperly influenced by passion, prejudice and other arbitrary factors and Appellant's trial was fundamentally unfair.

Based upon the within and foregoing reasons and authority, Appellant has been sentenced to death in violation of the Eighth and Fourteenth Amendments, Article 1, Section 1, Paragraphs 1 and 17 of the Constitution of the State of Georgia (1983), and O.C.G.A. Section 17-10-35, and requests that the Court reverse his sentences of death.

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